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ASSESSING THE EUROPEAN UNION'S PROSPECTS FOR COHESION

by

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13. ABSTRACT

This thesis assesses the prospects for building a constitutional structure for the European Union (EU) that will secure popular support and protect national sovereignty, in the light of four theories of political integration: functionalism, neofunctionalism, federalism, and concurrent majority. The thesis assumes that the people in the nation-states comprising the EU wish, for the most part, to retain a significant measure of sovereignty as part of their national identity. The thesis concludes that functionalism and neofunctionalism rely too much on the elite decision-making process to preserve popular sovereignty and that they would, in the long term, strip the EU member states of their sovereignty. Federalism is also likely to be repellent to many in the EU countries because it tends to transfer the sovereignty of the states to the central government, and the process of judicial review may leave the member states with no protection from encroachment by the central government. The theory of concurrent majority, the thesis determines, holds the greatest promise for maintaining and deepening the cohesiveness of the EU. A concurrent majority system would allow the member states to retain their sovereignty, and the ultimate interpretation of the EU "constitution" would rest with the states collectively. The thesis recommends that a clearly written constitution be drawn up at the 1996 EU Intergovernmental Conference to be ratified by the citizens of the member states, if they wish to ensure protection for national rights and sovereignty.

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ASSESSING THE EUROPEAN UNION'S PROSPECTS FOR COHESION

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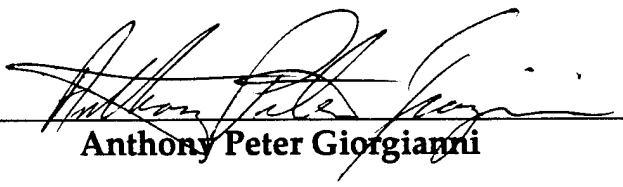
Author: 
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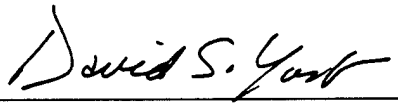
Approved by: 
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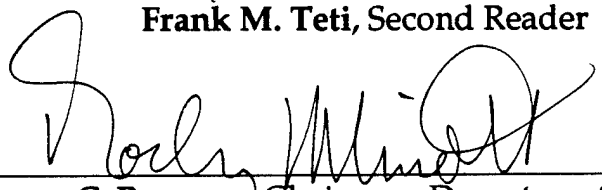
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ABSTRACT

This thesis assesses the prospects for building a constitutional structure for the European Union (EU) that will secure popular support and protect national sovereignty, in the light of four theories of political integration: functionalism, neofunctionalism, federalism, and concurrent majority. The thesis assumes that the people in the nation-states comprising the EU wish, for the most part, to retain a significant measure of sovereignty as part of their national identity. The thesis concludes that functionalism and neofunctionalism rely too much on the elite decision-making process to preserve popular sovereignty and that they would, in the long term, strip the EU member states of their sovereignty. Federalism is also likely to be repellent to many in the EU countries because it tends to transfer the sovereignty of the states to the central government, and the process of judicial review may leave the member states with no protection from encroachment by the central government. The theory of concurrent majority, the thesis determines, holds the greatest promise for maintaining and deepening the cohesiveness of the EU. A concurrent majority system would allow the member states to retain their sovereignty, and the ultimate interpretation of the EU "constitution" would rest with the states collectively. The thesis recommends that a clearly written constitution be drawn up at the 1996 EU Intergovernmental Conference to be ratified by the citizens of the member states, if they wish to ensure protection for national rights and sovereignty.

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I. INTRODUCTION

Whatever political tendencies or currents we choose as examples, it will be found that they always sow the seed of their own destruction when they lose their sense of proportion and overstep their limits.[1]
(Wilhelm Röpke)

The aim of this thesis is to assess the European Union's prospects for cohesion. It is important for United States' national security interests to reach reliable judgments about the EU's prospects for cohesion because of the EU's intrinsic economic, political and strategic importance.

In the economic sphere, which will not be discussed in great detail in this thesis, the EU boasts a combined market that buys twenty-four percent of U.S. exports, and furnishes eighteen percent of U.S. imports.[2] In 1993, the United States had over $200 billion worth of trade with the European Union, as much as with Japan and China combined.[3] The EU's combined gross domestic product (GDP) was recently calculated at $6.9 trillion[4], its total exports are over twice those of the United States, and its population exceeds that of the U.S. by at least 70 million.[5] The European Union is an entity, economically, that the U.S. cannot afford to ignore.

The EU has, potentially, much to offer in the sphere of Eurasian security. With total armed forces of over two million[6], an excellent defense industry infrastructure, and claiming two of the world's five recognized nuclear powers,

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[1]Wilhelm Röpke, A Humane Economy: The Social Framework of the Free Market (New York: University Press of America, 1986 [1960]): 90.
[2]Mary H. Cooper, "Europe 1992: The Issues" CQ Researcher (28 June 1991): The figure was calculated for the twelve members which comprised the EU at that time.
[3]"America and Europe," The Economist (19 February 1994): 24.
[4]"Main Economic Indicators," OECD (January 1995). The figures are calculated for the current 15 member-nations of the EU; the data given in the OECD report is for the year 1993--calculated in 1993 dollars--except for Belgium, Greece, Ireland and Luxembourg, whose figures are for 1991.
[5]"Back to the Drawing Board," The Economist (10 September 1994): 22.
[6]Ibid.

the EU has the technological capability and resources to become a military power on par with the United States. A cohesive EU defense force could have a major impact on the continent, especially in countering the aggrandizing tendencies of Russia in its "near abroad." Several of the member nations wield substantial influence in Africa and the Middle East regions as well. Such capabilities could allow the United States to diminish its defense burdens.

The relative degree of cohesion achieved by the EU will be an extremely important factor in determining whether the United States will face a single political-military entity across the North Atlantic, or a potentially fractured set of antagonistic nation-states. The EU's cohesion has significant implications for the future of NATO and other trans-Atlantic institutions (e.g., Partnership For Peace, and the Organization for Security and Cooperation in Europe); and for international security management efforts regarding nuclear proliferation and ethnic and environmental conflict. The EU's cohesion, decision-making processes, and probable future course therefore constitute an important issue for U.S. strategic planners and policy-makers.

But, before the EU can build its political cohesion and obtain such military capabilities, several important obstacles must be surmounted. Politically, the debate about "an ever closer union" is in some ways more spirited now than ever before. With the advent of the Maastricht Treaty (the Treaty on European Union) and the official recognition of a European Union, some nations within the EU are very hesitant about losing their sovereignty. It is difficult to convince a nation to subordinate itself to a higher political authority on the issues that matter the most: economics, security, and the social well-being of its citizens.

The current debate about an "à la carte" EU versus an EU of concentric circles presents the people of Europe with a choice that has important

consequences. Several of the national leaders, in particular John Major of Britain,[7] are partial to the idea of an "à la carte" Europe where a nation has the option to pick and choose which of the EU arrangements it prefers to participate in and which it prefers to abstain from. For instance, Britain could participate in the EU's foreign and trade policies while abstaining from the social and labor policies. A shortcoming to this approach is that nations that choose to partake in a majority of the options may view nations that choose only a few options as free riders.

A Union of concentric circles has been suggested by some politicians in France and Germany.[8] In this conception, the EU would be centered on a core of nations, most likely the Benelux nations, Italy, France and Germany; and France and Germany would comprise the "core of the hard cores."[9] Opponents of this integrative method argue that it would force the EU into a two-speed system. Also, the critics opine, in order for the outside nations to join the "inner core," they would have to give up more than the "inner core" nations initially relinquished. Moreover, as the EU grew in size, the "inner core" nations might attempt to retain the same amount of relative influence within the EU at the expense of the entering nations, making, in effect, second class citizens of the new EU members.

Nations in both categories have another serious question: how much sovereignty and decision-making authority should be relinquished to the European Commission in Brussels? For once sovereignty and decision-making

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[7] "European Union," The Economist (10 September 1994): 21-23. The reference was in regards to a speech by Prime Minister Major at the Hague on 7 September, 1994. See also "The Memorandum on The United Kingdom Government's Approach To The Treatment Of European Defence Issues At The 1996 Inter-Governmental Conference."

[8] "Europe à la carte," The Economist (10 September 1994): 14-15.

[9] "European Union," The Economist (10 September 1994): 21-23.

authority are relinquished, it is difficult to retrieve them without a political struggle. Indeed, history has demonstrated that political struggles over sovereignty and decision-making authority can easily degenerate into a conflict of arms.

Along with the political aspects of the European Union come the economic and security issues that the EU is currently contending with. The common agricultural policy (CAP) currently takes over fifty percent of the total EU budget.[10] With the completion of the Uruguay round of the General Agreement on Tariffs and Trade (GATT), the EU is committed (on paper) to lower the tariffs that protect the EU farmers. This fact, and the Eastern Europeans' pressures to export goods, are rapidly creating a competitive international market. This poses a threat to EU farmers. Moreover, some nations' economic interests are not coincidental with the rest of the EU; the question then becomes, which policy has priority, the national or the European?[11]

Security planning is complicated by the fact that many in the United States favor arrangements to encourage the NATO Europeans to pay a larger share of the defense costs for American troops on European soil. The Central and East Europeans are trying to get under the collective defense umbrella of NATO, while the Russians are trying to turn NATO into a collective security organization, thus destroying NATO as a collective defense pact. In this context, European security trends could end in a situation unfavorable to the EU.[12]

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[10]"Tilling the soil in a wider Europe," The Economist (20 August 1994): 15-16. The figure is for the 1993 EU budget.

[11]For example, Spain's interests on fishing rights are in contradistinction with the agreement the EU made with Canada; see "Bigger fishers, small nets, smaller stocks," The Economist (8 April 1995): 48.

[12]"Partners for what?" The Economist (24 September 1994): 40-50. See also Gordon Smith, "Managing EU-NATO Relations," International Institute for Strategic Studies (IISS 36th Annual

It is in the interest of the United States to promote the development of an EU that is more effective as a political and economic entity. Economically, it is much easier to conduct trade negotiations with one trade representative than with fifteen separate representatives with their own agendas; the same reasoning applies in the political and security realms as well.[13] Yet the two paths to integration mentioned above do not promise to create an effective EU. The "à la carte" method would allow the members to become too fractured, and would not promote effective decision-making at the Union-level. The union of concentric circles might, under some circumstances, lead to an abuse of power by the inner circle members over the outer circle members.

In order for the European Union to overcome its present difficulties, and be prepared to surmount future difficulties as well, it needs to operate as an effective entity. In order to be effective, the EU needs to have unity, to be able to make coherent decisions in a reasonable amount of time. But how, one may ask, is the European Union to reach a level of unity to enable it to operate effectively, yet at the same time ensure the liberty and sovereignty of the member-states? This is the conundrum that the member states of the European Union are facing as they are approaching the 1996 Intergovernmental Conferences.

The EU institutions seem to be inadequate for the current number of member states, and are seen by many to be wholly inadequate for an increase in size due to future members.[14] The efficiency of the European Commission is predicted by some to decrease as the number of Commissioners increase. And

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Conference, Vancouver, 8-11 September 1994), and Douglas Hurd "Developing the Common Foreign and Security Policy," International Affairs 70, no. 3 (1994): 421-428.

[13]Although some may argue that it is in the best interest of the United States to see the EU as a splintered and ineffective organization in order for the United States to retain as much influence in Europe as possible.

[14]"Talks about Talks," The Economist (13 May 1995): 52-53.

the Council of Ministers is seen by some as the tyranny of the minority in that "small countries with just 12% of the Union's population would be able to stymie the wishes of the remaining 88%."[15] As the progress for "an ever closer union" continues, these constitutional questions will remain in the forefront of debate among the member states.

This thesis uses four different theories of political integration to assess the prospects for the EU becoming a cohesive political structure. The theories will also assess the prospects for building a constitutional structure as it relates to protecting national sovereignty and securing the popular support required to give the EU its legitimacy. These theories are functionalism (and its close relative, neofunctionalism), federalism in its various facets, and John C. Calhoun's theory of concurrent majority. The hypotheses of the different theories to be tested may be summarized as follows.

A. HYPOTHESES

1. Functionalism and Neo-Functionalism

a. The functional tasks of economic and welfare cooperation, outside the area of political conflict, will create a community of interest and feeling which will ultimately make national frontiers meaningless.

b. The organization and scope of this activity can be functionally determined, varying according to the task, without the deliberate elaboration of a constitutional framework.[16]

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[15] Ibid.: 52. The article contends that the disproportionate representation is a point of contention for the large EU members.

[16] R.J. Harrison, "Testing Functionalism," in Functionalism: Theory and Practice in International Relations: 115. The two strategies are derived from David Mitrany's A Working Peace System: An Argument for the Functional Development of International Organization (London: RIIA, 1943).

2. Federalism

a. When states come into a compact with one another, the sovereignty that resided in the states is transferred to the central authority.

b. The central government has the proper authority and ultimate jurisdiction within the federal system.[17]

3. Concurrent Majority

a. When states come together in a compact, the sovereignty is retained in the states.

b. To ensure the sovereignty of the states in the compact, the constitution will be written to delegate certain enumerated powers to the central government, powers only necessary for the well being of the union. The constitution will be strictly adhered to with the appropriate amending criteria set forth to allow the constitution to properly adjust in concert with an ever-changing union.

c. The right of judgment will ultimately reside in the states in order to prevent encroachment by the central government; with proper safeguards set forth to prevent the domination of the union by one or a few states.[18]

B. METHODOLOGY

This thesis analyzes the examples contained in the expositions advanced by the most prominent exponents of each particular theory of integration in order to assess their validity. The second chapter examines the theories of functionalism and neofunctionalism. The examples analyzed are those used by

[17]James Madison, Alexander Hamilton and John Jay The Federalist Papers ed. by Isaac Kramnick (New York: Penguin Books, 1987): 254-259, *Federalist Number Thirty-Nine.* and Carl J. Friedrich Trends of Federalism in Theory and Practice (New York: Frederick A Praeger, 1968).

[18]The Papers of John C. Calhoun Volumes X, XI and XII, Robert O. Meriwether, Edwin W. Hemphill, and Clyde N. Wilson et al., eds. (Columbia S.C.: University of South Carolina Press, 1978) and John C. Calhoun, Union and Liberty Ross Lence, ed., (Indianapolis, IN: Liberty Fund, 1992).

the main theorists. Functionalism's main proponent, David Mitrany, uses the European Coal and Steel Community (ECSC), and the subsequent European Economic Community (EEC). Neofunctionalism's creator, Ernst Haas, uses the example of the International Labor Organization (ILO). The thesis then examines the United Nations (UN)--as an organization held by the functionalists and neofunctionalists to be an example of their respective theories--and then considers whether the UN is an adequate model for the EU to emulate.

Chapter III discusses the theory of federalism within the framework of James Madison's contribution to the *Federalist Papers* (in particular, *Federalist No.'s Ten, Thirty-Nine* and *Fifty-One),* as well as Carl Friedrich's *Trends of Federalism in Theory and Practice.*[19] The analysis of Madison is directed at his particular theories of federalism in the United States of America. The thesis then examines the subsequent path that American federalism has taken. Friedrich discusses federalism as a process of integration in the European Union since its inception in 1950.[20]

John C. Calhoun's theory of concurrent majority in the fourth chapter offers the examples of the governments of the Republic of Poland-Lithuania, the Iroquois Confederacy of Six Nations, the United Kingdom (circa 1688) and the Roman Republic. The thesis uses outside sources regarding each of the examples to determine whether these theories of integration are, in fact, supported by these examples. Next, the thesis evaluates each of the four theories as a framework for understanding the European Union, as it exists now and under the articles of the Maastricht Treaty.

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[19]Carl Friedrich, Trends of Federalism in Theory and Practice (New York: Frederick Praeger and Co., 1968).

[20]Although Friedrich's book analyzes other cases, this thesis considers only the United States and the European Union.

Finally, the fifth chapter attempts to determine which of the four theories (and their respective hypotheses)--functionalism (and neofunctionalism), federalism, and the theory of concurrent majority--would be the most effective for determining the probable future cohesiveness of the European Union. A hypothetical European constitution is then constructed, using the available political instruments in the EU, to reflect the most useful model.

II. FUNCTIONALISM AND NEOFUNCTIONALISM

I cannot accept your canon that we are to judge Pope and King unlike other men, with a favourable presumption that they did no wrong. If there is any presumption it is the other way against office holders of power, increasing as the power increases...Power tends to corrupt and absolute power corrupts absolutely. [21] *(Lord Acton)*

A. FUNCTIONALISM

Functionalism, in essence, derives from the premise that "form follows function." The main tenet of functionalism resides in the premise that all governments have adopted institutions that promote the welfare of the public.[22] The functional theory holds that as international community-level institutions increasingly tend to take care of these social needs, the citizens' loyalty will be transferred from the state to the community-level organization that is fulfilling their needs.[23] Then, in conjunction with the creation of this new organization, or, with changes in science or technology that affect the society, there will be new problems that give rise to another need for more community-level control of the problem. Mitrany calls this process "ramification."[24] Instead of the state serving in its traditional role as the protector of life, liberty and property, the new community-level international organization provides social security and welfare to citizens of all the member nations, thus cutting across the bounds of territorial disputes and violence.

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[21]John E. E. D. Acton, "Letter to Mr. Creighton, 5 April 1887," Essays in the Study and Writing of History Volume II, J. Rufus Fears, ed., (Indianapolis: Liberty Fund, 1986): 383.
[22]David Mitrany, "The Prospect of Integration: Federal or Functional?" in A. J. R. Groom and Paul Taylor, eds., Functionalism: Theory and Practice in International Relations (New York: Crane, Russak and Company, Inc., 1975): 53-78.
[23]Paul Taylor and AJ Groom, "Introduction: Functionalism and International Relations," Functionalism: Theory and Practice in International Relations: 4.
[24]James E. Dougherty, and Robert L. Pfaltzgraff, Jr., Contending Theories of International Relations (New York: Harper Collins Publishers, 1990): 433.

Functionalism tends to disdain the idea of supra-national or intergovernmental organizations, instead preferring the idea of a community of organizations which have political control of the economic and welfare planning process. The functionalist tends also to prefer the scientific, or positivistic, problem-solving methodology. Objectivity and utilitarian viewpoints are believed to circumvent the antagonistic aspects of societal interaction, thus preventing conflict between peoples or governments.[25]

The functionalists believe that the promotion of an international welfare system will "undermine loyalties to the state and build an international socio-psychological community which transcends the frontiers of the state."[26] According to A.J.R. Groom, the goal is to create, in essence, a "Fabian" society.[27] This process of allegiance-shifting, according to the functionalists, occurs almost instinctively, without any conscious thought. According to Mitrany, functionalism is based upon five different propositions about society and two strategies that flow from them:

> 1. Economic and welfare interests provide a basis for community.
> 2. The nation-state is without any permanent basis. It is divisive, violent and blinds men to their real needs and interests.
> 3. The satisfaction of economic and welfare needs creates common interests though specific interests may differ in kind and degree.
> 4. The elements of world community are already in place...(e.g., the United Nations).
> 5. Political discussion, *particularly constitution building*,...is divisive and prejudicial to community building (emphasis added).
> These five propositions lead to the following strategies.
> 1. Specific functional tasks of economic and welfare cooperation, outside the area of political conflict, will create a community of interest and feeling which will ultimately make national frontiers meaningless.

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[25]A.J.R. Groom, "Introduction," in Functionalism: Theory and Practice in International Relations (New York: Crane, Russak and Company, Inc., 1975): 15.
[26]Ibid.: 4.
[27]Ibid. The Fabian Society came into existence in the late nineteenth century with the goal of "the extinction of private property in land, and appropriation of all industrial capital by the community..." according to W.E.H. Lecky's Democracy and Liberty, Volume II (Indianapolis, IN: Liberty Fund, 1981): 316;

> 2. The organization and scope of this activity can be functionally determined varying according to the task...without the deliberate elaboration of a constitutional framework.[28]

Although Mitrany discussed functionalism within national societies (such as the New Deal within the United States), this thesis will focus on his examples of functionalism involving several countries as more germane to assessing the future of the EU.

In fact, one example of functionalism cited by Mitrany is the formation of the European Coal and Steel Community (ECSC). France and Germany put control of their coal and steel industries into a community-level organization with a clearly defined set of parameters within which to operate.[29] Then, the need for other community-level organizations became evident to alleviate the problems that arose from the birth of the ECSC. For example, the European Court of Justice was given more authority in order to properly settle any disputes between the member nations. The European Atomic Energy Community (Euratom) is yet another example for the functionalists of the creation of a community-level organization with a specialized need requiring technocrats instead of politicians.[30]

Independent analyses of the ECSC state that the organization was formed not because of a commonly felt need to place control in a community-level institution, but rather due to the actions of governmental elites who had their own interests in mind.[31] The French wanted the ECSC to keep German

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[28]R.J. Harrison, "Testing Functionalism," in Functionalism: Theory and Practice in International Relations: 115. The five propositions and two strategies are derived from David Mitrany's A Working Peace System: An Argument for the Functional Development of International Organization (London: RIIA, 1943).
[29]David Mitrany, "The Prospect of Integration: Federal or Functional?": 69.
[30]Charles Pentland, International Theory and European Integration (New York: The Free Press, 1973): 93.
[31] Ibid.: 98.

industrial potential in close check. The Germans wanted the ECSC so that they could be recognized as an equal once again, and to prevent arousing suspicion about a German industrial build-up.[32] The founder of the ECSC, Jean Monnet, envisaged the ECSC as "the first concrete foundation of a European *federation*."[33] As to Euratom, Charles Pentland states that the organization--instead of acting as a supranational economic coordinator of resources acting independently of the nation-state--has assumed the status of an organization devoted to "pure research" and acts as a "adjunct or complement to separate national nuclear programs."[34]

Mitrany, in his defense of functionalism, states that the need for nation-states to abandon their sovereignty stems from the "massive and rusty gates" of constitutionalism. In his view, constitutions hamper nations in reforming and adapting to the ever-changing, increasingly technological, international system.[35] The new challenges, according to Mitrany, can most effectively be handled by a centralized multi-national authority; but a nation with a constitution will resist every measure to put increasing control into a central multi-state authority, let alone a supranational authority.[36] To Mitrany, the constitution is anathema to the process of functionalization. The right of suffrage of the citizen is also seen as a hindrance to the process of functionalization. Democracy is seen by Mitrany as

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[32]James B. Steinberg, "An Ever Closer Union:" European integration and its Implications for the Future of U.S. - European Relations (Santa Monica, CA: RAND, 1993): 4. See also footnote 7 on same page.
[33]John Pinder, European Community: The Building of a Union (Oxford, UK: Oxford University Press, 1991): 4. Emphasis added.
[34]Charles Pentland, International Theory and European Integration: 96.
[35]David Mitrany, "The Functional Approach to World Organization," International Affairs 24, no. 3 (1948): 352.
[36]Ibid.: 352-353.

a "snare and a delusion" which prevents the technical experts from being in positions of responsibility in order to solve the problems of society.[37]

Functionalism appears useless for assessing the future cohesiveness of the European Union. Contrary to the ideas of Mitrany, the concept of the nation-state is still a viable principle. If the fifteen nations within the European Union were asked to relinquish their sovereignty, their answer would most likely be a unanimous no. Several of the nations with long histories of autonomy would be particularly loath to give control of their economic and political capital to an independent supranational organization that is only answerable to a "functional parliament" consisting of self-selected technocrats. Even if the functional process of unconscious integration or allegiance-shifting to an entity outside the national government was in process, the nation would almost certainly notice and attempt to arrest the process.

For example, France noticed the attempt to have the European Parliament (EP) assume control of EEC expenditures and came forth with the "Luxembourg Compromise" in order to thwart qualified majority rule in the Council of Ministers.[38] De Gaulle realized that if the EP gained any portion of control, the tendency to want to gain more control would always be prevalent. Therefore, in order to prevent the Council of Ministers from outvoting France , de Gaulle left the French chair on the Council vacant, thus preventing any decision-making.[39] The "Luxembourg Compromise" states that unanimity of the member nations

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[37]David Mitrany, "The Functional Approach in Historical Perspective," International Affairs 47, no. 3, (1971): 540. Mitrany gives an example of an effective functional system in the United Nations with the specialized agencies and their "functional parliaments," which offer "functional representation."

[38]John Pinder, European Community: 12-13.

[39]Dick Leonard, Pocket Guide to the European Community (London: Basil Blackwell and The Economist Publications, 1989): 11.

shall be required when, in the opinion of one member, the matter at stake bears vital importance to the member.[40]

Another problem with the functionalist model is the tendency for an ever-increasing amount of centralization to occur. Mitrany's assertion that the specialized areas of functionality would stay in their respective spheres runs counter to human nature and history. If there is not in place some sort of check or barrier against an organization, it will always try to gain more influence or power. For example, for every rise in a new functional organization there should be coordination with the other functional organizations to prevent redundancy and wastage of resources. But the more coordination that is required, the more centralized planning will have to take place, until the entire society comes under the jurisdiction of the centralized planning organization. The concept of centralized economic planning then comes into being with all of its concomitant problems.

There are two major problems of the centralized planning concept. The first problem is the inefficiency of the allocation of resources. The second problem, and the most important to the member states, is the absolute surrendering of their sovereignty, politically and economically. The functionalists believe that the experts, engineers and technocrats that head the functional organization are the best qualified to determine the allocation of resources that come under the jurisdiction of that particular organization. Yet, as the former Soviet Union illustrated, and prominent economists have stated, the best allocation can never be determined by any centralized bureau.[41]

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[40]Ibid.: 35-36.

[41]For an excellent account of the planning process of the former Soviet Union, see Mikhail Heller and Aleksandr Nekrich, Utopia in Power: The History of the Soviet Union From 1917 to the Present (New York Simon & Schuster, 1986). See especially pages 632-633 for a comparison between the Soviet centralized agriculture system and the agriculture output of the United States.

The second problem would end up reducing the member states to administrative units used in the centralized planning process. The reason national sovereignty would end up in the "dustbin of history" is succinctly stated by economist Wilhelm Röpke:

> In the case of real integration of national economies which, being socialist, depend entirely on a sovereign political direction, the countries concerned would have to be so thoroughly united politically that the union would be tantamount to annexation by the leading power...Consequently, such integration has only been successful when,...national sovereignty has been literally annihilated by force, i.e. by the act of annexation.[42]

In the case of the EU, of course, the socialism identified by Röpke is not a predominant factor in the governments of the major countries, including Germany, the leading economic power of the EU.

The functionalists would also be hesitant to consider any formal treaty (or constitution) in the forming of a closer union. The reason for the functionalists' distaste for written constitutions in a supra- or international compact is that the constitution is seen as a hindrance to the centralization process of further integration. The constitution would act as a warning device anytime the act of "ramification" was occurring, thus halting the functionalization process. Lastly, the ideal of a socialistic welfare state has undergone tremendous critical scrutiny in the past several years. With the disintegration of the "workers' paradise" of

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For an economists' viewpoint on centralized planning under the functionalist skein, see F.A. Hayek The Counter-Revolution of Science: Studies on the Abuse of Reason (Indianapolis: Liberty Fund, 1979 [1952]). Hayek states that the affinity towards planners and engineers is directly attributable to Henri de Saint-Simon, the French philosopher who held that science and scientific planning could effectively run government without the help of politicians. See also Ludwig von Mises Socialism: An Economic and Sociological Analysis (Indianapolis IN: Liberty Fund, 1981). For a philosophical inquiry into to the inherent problems of central planning and the functionalist approach in general, see Michael Oakeshott, Rationalism in Politics and Other Essays (Indianapolis: Liberty Fund, 1991 [1962]), especially 6-42. Oakeshott's thesis is that the Rationalists' belief in pure human reason to guide and solve all of life's problems in the political sphere is not only fallacious but dangerous.

[42]Wilhelm Röpke, "The Place of the Nation," Modern Age (Spring 1966): 127.

the USSR, and the fact that the most socialized nations within the EU at present are facing growing difficulties in financing their welfare expenditures, the functionalist ideal of a welfare state is in jeopardy.

B. NEOFUNCTIONALISM

Neofunctionalism, while similar to functionalism in its assumptions about social advancement, holds that the process of integration requires an act of deliberate choice to come into existence. The neofunctionalists contend that people, or more specifically, the elites, make a conscious decision to put the authority for specific activities into a supranational organization in order to maximize their gains.[43] Performing these activities would generate "new problems which, if the new demands and expectations of the organization were to be met, could only be resolved by more integration and by granting more powers to the central authorities."[44] This process is known as the "spill-over" effect.[45]

The neofunctionalists, starting with Ernst Haas, use the ECSC as the standard-bearer example. The ECSC, according to the neofunctionalists, was initially not supported by many of the elites in Europe. But, as the success of the ECSC became clearer, the elites "placed themselves in the vanguard of other efforts for European integration, including the Common Market."[46] The neofunctionalists tend to favor the technocratic method of political leadership, although they do concede that the political relationships involving the traditional nation-states are a critical factor in the process of integration.

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[43]James E. Dougherty and Robert L. Pfaltzgraff, Jr. Contending Theories of International Relations: A Comprehensive Survey Third Edition, (New York: Harper Collins Publishers, 1990): 438.

[44]Nina Heathcote, "Neofunctional Theories of Regional Integration," Functionalism: Theory and Practice in International Relations: 40.

[45]Ibid.

[46]Dougherty and Pfaltzgraff, Contending Theories of International Relations: 439.

Haas also uses the neofunctionalist model to analyze the International Labor Organization.[47] Leadership plays a major role in the neofunctionalist theory. Instead of seeing the integration process as an unconscious act (as in functionalism), neofunctionalism holds that it depends for its impetus on the deliberate act of the leaders who are "willing and able to persuade member governments that unintended consequences may... be useful for the governments, and that the objectives of the [supranational] organization must therefore be shifted upward,"[48] and that the shift upward "can be met only by strengthening the [supranational] organization." The ILO paradigm has the objective of, in the pursuance of protecting and advancing labor standards and welfare, "claiming new powers and tasks, as the original task founders on spotty implementation by the member governments."[49] The ILO, with the help of the trade union, identifies the employer as the adversary. The end result would be as follows:

> Disparate subgoals among trade unions and governments force an expansion and dilution of the program; as a result, the original ideology is strained, and can be restored *only by redefinition at a more comprehensive level*. The field of standard-setting thereby comes to include technical assistance for labor efficiency, protection of human rights and modernization of pre-industrial societies (emphasis added).[50]

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[47]Ernst B. Haas, Beyond the Nation-State: Functionalism and International Organization (Stanford, CA: Stanford University Press, 1964): 127. Although Haas uses the term functionalism, later works on the subject label the Haas theory as neofunctionalism because it expanded on Mitrany's work. See, Charles Pentland, International Theory and European Integration (New York: The Free Press, 1973): 101, and Nina Heathcote, "Neofunctional Theories of Regional Integration," in Functionalism: Theory and Practice in International Relations: 38.
[48]Ernst B. Haas, Beyond the Nation-State: 126.
[49]Ibid.: 134.
[50]Ibid.

A recent journal article examined the actual impact of the ILO on the advancement of the modern welfare state.[51] The research examined the conventions of the ILO in order to determine if they had an impact on the social welfare expenditures of a nation in the manner that Haas predicted.[52] The results showed that for the majority of conventions, the Western industrialized nations followed the recommendations set forth by the ILO. The "ILO ratifications significantly increase welfare spending."[53] The ILO's "apparent distance [from the national governments]," the authors conclude, "permits the advocacy of rationalized policies, unsullied by parochial interests." Although the study concluded that the ILO did not completely fulfill the objectives set forth by Haas in his model, one can gather that the ILO has had an influence on members in their behavior relating to labor standards and welfare. The last point one can infer is that the critical aspect of "spill-over" seems to be missing from the modern ILO. There has not been a subsequent growth of related supranational organizations caused by the actions of the ILO. This lack of "spill-over" can be attributed to several factors: the reluctance of the United States to be an active participant, and the unwillingness of many of the member nations to let an outside organization have complete control over their labor standards.

The value of neofunctionalism as a conceptual framework for understanding the integrative process of the EU is still being seriously assessed

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[51]David Strang and Patricia Mei Yin Chang, "The International Labor Organization and the welfare state: institutional effects on national welfare spending," International Organization 47, no. 2 (Spring, 1993): 235-262.

[52]Messrs. Strang and Chang state that the convention, being supported by the member nations workers, employers and government officials, if ratified by the member nations' legislature, is, in effect, the same as an international treaty.

[53]Strang and Chang, "The ILO:" 249. The study states the coefficient of determination (the confidence of their model) was 82%, which is very good. Not surprisingly, the study stated that the United States was a welfare state "laggard."

by scholars.[54] As a theoretical framework for the integration of nations, neofunctionalism displays political shortcomings which make it unusable for building a unified Europe. The first criticism is that the neofunctionalist model predicts a steady, gradual process of integration.[55] Yet from 1950 to the present, the process of European integration has taken many turns. From the "Luxembourg Compromise" of 1966, the problems with the Maastricht Treaty's ratification in 1992-1993, the Exchange Rate Mechanism crisis of September 1992, to Norway's negative referendum regarding EU membership in 1994, the integration of the EU has proceeded with starts and stops.

Another criticism states that the neofunctional reliance on empirical data to confirm the theory does not work.[56] The neofunctionalists continue to gather data until the theory seems to "converge toward an increasingly complex and indeterminate ideal-typical description of the single case of the EC."[57] The reason that the empirical testing does not consistently work, no matter what data is used or in what fashion, is that mathematical calculation cannot predict the occasional digression in human behavior.[58] The "Luxembourg Compromise"

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[54]Andrew Moravcsik, "Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach," Journal of Common Market Studies 31, no. 4 (December 1993): 478.

[55]Ibid.: 476.

[56]Andrew Moravcsik, "Preferences and Power in the European Community:" 476, and Charles Pentland, International Theory and European Integration: 146, and Nina Heathcote, Neofunctional Theories of Regional Integration," in A.J.R. Groom, Functionalism: 45.

[57]Ibid.: 476.

[58]For an explanation of the unreliability of mathematical modeling on society, see Ludwig von Mises, Human Action: A Treatise on Economics 3rd Edition (Chicago: Contemporary Books, Inc., 1966 [1949]): 200-231 and 350-357; F.A. Hayek, The Counter-revolution of Science; and Wilhelm Röpke, A Humane Economy: The Social Framework of the Free Market (New York: University Press of America, 1986 [1959]), especially 246-261. Röpke responds to the claim that mathematics provides precise answers in the social sciences by stating that: "In a science in which the subject matter simply precludes the exactness of mathematics and the natural sciences, such a claim is bound to raise the gravest misgivings. We reply that it is better to be imprecisely right than to be precisely wrong," (p. 249).

again illustrates this point. The neofunctionalists would have expected that the French would have wanted to agree with the other five members then in the EEC about the European Parliament because it was a natural progression from voting by unanimity to voting by qualified majority, and that it was rational. Yet the Gaullist attitude would always have put France before Europe where French sovereignty was concerned.

The United Nations specialized agencies are cited by both the functionalists and the neofunctionalists as an example of their respective theories. The UN is claimed to offer a path for international integration that will cut across the bounds of the nation-state. The specialized agencies are seen to be primary examples of welfare-oriented organizations that can shift the allegiance of the peoples from the nation-state to the UN. But, recent trends in the UN make it clear that the non-accountability of an organization may offer opportunities for an abuse of that organization's position.

The UN, until very recently, has had no inspector general, or an internal affairs department that is answerable to the Security Council, the General Assembly, or the General Secretary. As a result, many abuses of the system have occurred.[59] At the least, the results represent a vast waste of money due to mismanagement and corruption; in the worst cases, the defects of the organization are claimed to have caused the death of untold thousands of refugees due to starvation from misappropriation of relief supplies.[60] Since the specialized agencies are not answerable to anyone, the result is not a functional organization run by the experts and scientists, but bureaucracies that are

[59]William Branigin, "The UN Empire, "The Washington Post (20-23 September, 1992). See also "The United Nations: Heart of Gold, Limbs of Clay," The Economist (12 June 1993): 21-24. Both articles suggest that the UN management system is extremely redundant and inefficient, and relies on a vast system of patronage , qualities not found in Mitrany's or Haas' philosophies.
[60]"William Branigin, "The UN Empire:" 1.

operated as self-perpetuating fiefdoms.[61] Also contrary to the functionalist theory is the fact that UN organizations, once created to solve a problem, are never disbanded and never fade away. An example of this is the UN Trusteeship Council that manages the decolonization of territories. Of the eleven original territories, there is one left. Yet, the Trusteeship Council maintains a budget in excess of $9 million, "including more than $114,000 to send up to a nine person 'visiting missions' to Palau for two weeks a year."[62] There are other examples of special commissions originally set-up to perform a functional task, but that refuse to fade away once the task is complete.[63]

Another aspect of the UN that does not shed a favorable light is the corruption. Across the African continent, there have been UN officials implicated in fraud, black marketeering, kickbacks and other devious enterprises. But due to the lack of oversight, the UN has a tendency to cover up the misdeeds, especially due to the influence of the regional "mafias."[64] Although no single organization is ever without a single fault, if the organization is not answerable to the voters, or (in this case) to the member states, efficiency and accountability rapidly become non-existent.

If the above characteristics are endemic to the UN and its specialized agencies, one can surmise that the same attributes will be assumed by future UN organizations, or by any autonomous supra- or international organization. A example of an organization that is currently being discussed is the Enterprise of the United Nations Convention of the Law of the Sea (UNCLOS). The concept was originated by Ambassador Arvid Pardo of Malta in 1967 when he stated to

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[61]Ibid.: 2.
[62]Ibid.,: 6.
[63]This phenomenon is not just endemic to the UN, but to any large bureaucratic organization.
[64]Ibid.: 12.

the UN General Assembly that the ocean seabed should be "the common heritage of humankind."[65] To adequately allocate the resources of the seabed, the Seabed Commission proposed setting up an International Seabed Authority. This Authority would then allocate the seabed to be harvested by those who were able to do so, providing that the nations who did the harvesting redistributed the resources and proceeds from the harvest, in addition to sharing the technology with all members.[66] "By establishing an international authority with an independent and vast source of revenue, the first substantial penetration would have been made of the wall of national sovereignty."[67] Although many industrialized nations are against the provisions concerning the sharing of technology,[68] some developing nations favor international agencies that would promote the leveling of national capital and wealth.[69]

With the above evidence of the UN as a functional or neofunctional organization, one can see that the European Union does not fit into the framework of the two theories. The ideal of EU-determined social welfare standards makes both the functional and neofunctional approach extremely unattractive to prominent political elites in some of the EU members, especially

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[65]A. LeRoy Bennett, International Organizations: Principles and Issues, 5th Edition (Englewood Cliffs, NJ: Prentice Hall, 1991): 321.
[66]Ibid.: 324
[67]Ibid.: 323.
[68]In fact, at the insistence of the United States, several of the more contentious issues were modified; but the treaty is still seen by many as "It's still 'Give me half of what you've got. Tell me everything you know." See William J. Broad, "Plan for Seabed Nears Fruition," New York Times (29 March 1994): B5-6.
[69]For an excellent discussion on redistribution, see Bertrand de Jouvenal, The Ethics of Redistribution (Liberty Fund, 1990 [1952]). De Jouvenal sums up the ethos of the redistributionists by stating: "What is to be held against them is not that they are utopian, it is that they completely failed to be so; it is not their excessive imagination, but their complete lack of it; not that they wish to transform society beyond the realm of possibility, but that they have renounced any essential transformation; not that their means are unrealistic, but that their ends are flat-footed. In fact, the mode of thought which tends to predominate in advanced circles is nothing but the tail-end of nineteenth-century utilitarianism." (p.48)

Britain. For example, it was Britain that "opted out" of the Social Chapter of the Maastricht Treaty. The reason given by Prime Minister Major was that once Brussels had authority to control the workplace in several limited fields, the Commission would then slowly expand its jurisdiction until Brussels would be dictating to Britons how they should work. Also, the fact that "decision-making is shifted to common institutions and bodies which cannot be controlled according to traditional democratic standards"[70] runs counter to the entire political ethos of Western Europe. Haas' definition of political integration states that it is "the process whereby political actors in several distinct national settings are persuaded to shift their loyalties, expectations and political activities toward a new center, *whose institutions possess or demand jurisdiction over the pre-existing national states."*[71] As stated before, power relinquished is seldom power returned. Once the nations surrender their sovereignty to either a set of community organizations, or a supranational organization, the national cultural and political identity that the EU members had will be in jeopardy. And if the Union were to fractionate due to some circumstance, then the former members would be extremely reluctant to reunite. Neofunctionalism runs into the same gamut of problems as functionalism in trying to predict the future cohesiveness of the European Union.[72]

The initial desires of the functionalists and neofunctionalists are not predicated on an authoritarian philosophy; they seem rather to be based on the

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[70]Wolfgang Wessels, "Rationalizing Maastricht: The Search For an Optimal Strategy of the New Europe," International Affairs 70, no. 3 (1994): 456.

[71]Ernst Haas, The Uniting of Europe: Political, Social, and Economic Forces 1950-1957 Stanford: Stanford University Press, 1958): 16. Emphasis added.

[72]For an excellent work describing the deteriorating effects of social welfare and the "cult of the colossal" (the centralized omnipotent government), see Wilhelm Röpke, The Social Crisis of Our Time (New Brunswick, NJ: Transaction Publishers, 1992 [1942]) .

desire to help avoid violence and promote the welfare of others. As F.A. Hayek stated:

> To undertake the direction of the economic life of people with widely divergent ideals and values is to assume responsibilities which commit one to the use of force; it is to assume a position where the best intentions cannot prevent one from being forced to act in a way which to some of those affected must appear highly immoral.[73]

With the decision-making to be left in the hands of a few technocrats, engineers and elites, and no accountability to the people because the "rusty gates" of a constitution are seen as a hindrance to efficiency, there would be an enormous tendency for the few to abuse their power.

In a perfect world, a system based on the functionalist or neofunctionalist model could prove to be adequate, but the world is far from perfect. Nationalism and ethnic troubles will plague mankind for the foreseeable future, and it seems apparent that the idea of a universal, benevolent welfare community (for the functionalists) or a similarly inspired supranational organization (for the neofunctionalists) is an unobtainable objective.[74]

Throughout history, one can see societies governed by the extremes, from the radical Jacobin democracy of the French Revolution, to the absolute totalitarianism of the Soviet Union. The purpose of a constitutional form of government is to make sure the pendulum stays in the middle, to be answerable to the people without the people themselves becoming a tyrannical majority. Unless qualified by robust constitutionalism, functionalism and neofunctionalism could lean towards centralized authoritarianism. The liberties of the nations and their citizens might be sacrificed at the altar of efficiency and

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[73]Friedrich A. Hayek, The Road to Serfdom (Chicago: The University of Chicago Press, 1944): 224.

[74]See, for example, Henry Kissinger, Diplomacy (New York: Simon and Schuster, 1994): 804-835.

economic distribution. Such a system could not exist for very long in the European Union, because the commitment to democratic values and constitutionalism appears firm in the member states. Functionalism and neofunctionalism seem to throw little useful light on the future cohesiveness of the EU.

III. FEDERALISM

Stripped of all its covering, the naked question is, whether ours is a federal or consolidated government; a constitutional or absolute one; a government resting ultimately on the solid basis of the sovereignty of the States, or on the unrestrained will of a majority; a form of government, as in all other unlimited ones, in which injustice, and violence, and force must finally prevail. [75] *(John C. Calhoun)*

Federalism, by definition, is the process by which states come into a union with each other, placing essential elements of the authority and sovereignty that used to be in the states, into a central authority. A prominent example of federalism in political integration is that of the United States. A European example is the Federal Republic of Germany. Other defining attributes of federalism are: a set of binding community laws, a budgetary process in the central authority's legislation, and a constitutional character in the institutions forming the federal bodies.[76] A major characteristic of a federal government is a system of checks and balances. These checks and balances can consist of separate legislative, executive and judicial branches of government, as well as powers reserved to the individual units (e.g., the states) that make up a federal system. For federalism to function properly, these checks and balances need to be maintained.

It is recognized by many scholars that the European Union is assuming a federal disposition.[77] Some have argued that the EU, since the Maastricht Treaty on European Union, is a newly founded federation looking for a constitutional

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[75]John C. Calhoun, "The Fort Hill Address: On the Relations of the States and Federal Government, 26 July 1831," Ross, M. Lence, ed., Union and Liberty: The Political Philosophy of John C. Calhoun (Indianapolis: Liberty Fund, 1992): 383.

[76]Alberta M. Sbragia "The European Community: A Balancing Act," Publius 23, no. 3 (Summer 1993): 24, footnote 3.

[77]Ibid.: 25. See footnote 7 on the same page for a short list of recent articles pertaining to the European Union in a federal framework.

foundation.[78] Just as the United States Supreme Court became an important part of the checks and balances of the national government, so too has the European Court of Justice in asserting the precedence of EU law over national law, in areas where the EU has constitutional jurisdiction.[79] One of the most difficult aspects of federalism is the division--or sharing--of sovereignty. If the state has any doubt as to the extent to which it would lose sovereignty, the impetus to enter into a federation will decline.[80]

A. JAMES MADISON AND FEDERALISM

James Madison is considered by many scholars to be the primary architect of the Constitution and the father of modern federalism.[81] Madison, the "Father of the United States Constitution" and the author of twenty-nine of the essays comprising *The Federalist Papers*, contended that the sovereignty of the federal compact is dual in nature.[82]

> The proposed Constitution, therefore, even when tested by the rules laid down by its antagonists, is, in strictness, neither a national nor a federal Constitution, but a composition of both. In its foundation it is federal, not national; in the sources from which the ordinary powers of government are drawn, it is partly federal and partly national; in the operation of these powers, it is national, not federal; in the extent of them, again, it is federal, not national; and, finally, in the authoritative mode of introducing amendments, it is neither wholly federal nor wholly national.[83]

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[78]George A Bermann, "Taking Subsidiarity Seriously: Federalism in the European Community and the United States," Columbia Law Review 94, no. 2 (March 1994): 455.
[79]Alberta M. Sbragia "The European Community: A Balancing Act,": 34-36. The case referred to is Costa v. Entel.
[80]Jeffrey T. Bergner, European Federal Union: The View From the American Convention of 1787 Hudson Briefing Paper no. 143 (Indianapolis, IN: Hudson Institute, August 1992): 3.
[81]George W. Carey, In Defense of the Constitution (Indianapolis: Liberty Fund, 1995 [1989]): 77.
[82]James Madison, "Number 39: The Conformity of the Plan to Republican Principles: An Objection to the Powers of the Convention Examined," in The Federalist Papers, Isaac Kramnick, ed., (New York: Penguin Books, 1987 [1788]): 254-259. The federal government defined by Madison consists of the states, while the national government is the same as today's definition of the federal government. This thesis defines the central government as the national or general government, except where Carl Friedrich describes the federal government, with the modern definition (the national government).
[83]Ibid.: 259.

Half of the sovereignty lies in the general government (or national authority), and half lies in the states (or the federal authority). To Madison, in order for the constitution to be effective, it must be "federal in foundation," that is, having the concurrence of the individual states participating in the federal compact. But, in the operation of general government, the authority rests in its national character, or the will of the aggregate.[84] Therefore, in the operation of the European Union, according to the logic of Madison, the ratification of a constitution would depend upon the concurrence of all members; and the operation of the government would be under the influence of the aggregate of the EU, which resides in the European Parliament, the Council of Ministers, and other common institutions.

Madison also stated that the greatest danger of disunion comes from the states having too much power and control over the central government.[85] Within this framework of the potential abuse of power by the states, Madison advocated a constitution in which the national government would have the ultimate authority over the state governments.[86] The first plan put forth by Madison at the Constitutional Convention was the Virginia Plan.[87] The Virginia Plan was perhaps the most nationalistic plan to be put forth at the Convention; it called for the complete supremacy of the national government over the States. According to George Carey, Madison envisaged a national government "that could reach down into the distinctly internal affairs of the states."[88]

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[84]James Madison, Alexander Hamilton and John Jay The Federalist Papers ed. by Isaac Kramnick (New York: Penguin Books, 1987): 254-259, Federalist Number Thirty-Nine.
[85]Ibid.: 293-302, in Federalist Numbers Forty-Five and Forty-Six. See also David M. O'Brien, "The Framers' Muse on Republicanism, the Supreme Court, and Pragmatic Constitutional Intrepretivism," The Review of Politics 53, no. 2 (Spring 1991): 251-288.
[86]Ibid.: "Editor's Introduction," 29-30. It is interesting to note that James Madison, who wrote that the federal government should have a veto on the states, penned also, the Virginia Resolution calling for states' interposition against an unconstitutional law, the Alien and Sedition Acts; see Felix Morley, Freedom and Federalism (Indianapolis, IN: Liberty Fund, 1981): 243-244.
[87]George W. Carey, In Defense of the Constitution: 83.
[88]Ibid.: 82.

Madison's grounding for the Virginia Plan stemmed from his earlier writings, including *Vices of the Political System of the United States* and *Of Ancient and Modern Confederacies*.[89] The Articles of Confederation, in Madison's view, were leading the United States into obscurity. The unanimity required of all the states led to ineffective decision-making, with the states holding the national government hostage to their whims. For Madison, the ultimate threat to the Union came not from the national government, but from the tendency of the "members to despoil the general government of its authorities, with a very ineffectual capacity in the latter [the national government] to defend itself against the encroachments."[90] In order to prevent this, Madison put his support behind the mode of government that would give the preponderance of power to the national government.[91]

At the Convention, after the demise of the Virginia Plan (due in large part to the recalcitrance of the smaller states),[92] Madison soon realized that he would need to compromise in order to obtain a more effective government. The end result was the Connecticut Compromise, which provided that the states would have an equal voice in the legislature with the more democratically elected House of Representatives. When the Constitution was signed by the delegates, Madison's next task was to aid in its ratification. Part of the process included the penning of the *Federalist Papers*.

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[89]Alexander Landi, "Madison's Political Theory," The Political Science Reviewer 6, (Fall 1976): 88-89.
[90]James Madison, "Number 45: A Further Discussion of the Supposed Danger From the Powers of the Union to the State Governments," The Federalist Papers: 293.
[91]For an excellent account of the turbulent period under the Articles of Confederation, see Forrest McDonald, E Pluribus Unum: The Formation of the American Republic, 1776-1790 (Indianapolis: Liberty Fund, 1979 [1965]), especially Chapters One through Four.
[92]Ibid.: 277-307.

Madison attempted to allay the fears of the anti-federalists by arguing in *Federalist Number Ten* that the size of the constituencies and the physical size of the union would prevent the electorate from choosing unvirtuous people to sit in office, and that the electorate would naturally tend to choose well-suited people. Thus Madison coined the extended republic theory. But, if by chance, "men of factious tempers" happened to gain political office, the union was too expansive, and the factions too many, to allow the bad politicians gain control of a majority and thus to wreak havoc on the government and union.

> A rage for paper money, for an abolition of debts, for an equal division of property, or for any improper or wicked project, will be less apt to pervade the whole body of the Union than a particular member of it, in the same proportion as such a malady is more likely to taint a particular county or district than an entire State.[93]

In dealing with the possible danger of tyrannical majorities, Madison stated that "the society itself will be broken into so many parts, interests and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority."[94]

Madison's concept of the duality of sovereignty was unique at that time; and his concept of an extended republic differed from that of previous theorists, Madison held that the national government ought to hold final say over matters concerning the relations of the states and the national government.[95] The *Virginia Resolutions* and the *Report of 1800* were a brief interlude in Madison's political career concerning the powers of the national government. Madison's final statement on national and state relations came during the Nullification

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[93]James Madison, "Number 10: The Same Subject Continued," The Federalist Papers: 128.
[94]Ibid.: 321, in Federalist Number Fifty-One.
[95]See George W. Carey's In Defense of the Constitution, especially Chapter Four, "James Madison and the Principle of Federalism," for an excellent discussion of the different phases of James Madison's political philosophy on federalism during his career as a statesman.

Crisis of 1831-1833. During the Nullification Crisis, Madison, in defense of his position in favor of the national government, stated that no single state had the right to abrogate the constitution.[96] Rather, Madison felt that the proper method for the states to gain redress from an encroachment by the national government would be to have several of the states come together, act in unison, and make their voice of disapproval heard.[97]

When serious differences arise between the states and the national government, Madison argued, the Supreme Court is the body best equipped to settle the matter.[98] Madison is said to have stated to Thomas Jefferson that the Constitutional Convention "intended the Authority vested in the Judicial Department as a final resort in relation to the States."[99] Madison felt that if the Supreme Court did not have such authority over the states, the states could pass any law, and the Constitution would become, in effect, a dead letter.[100] According to David O'Brien, "Madison took the pragmatic view that constitutional interpretation involves 'practical judgment,' not 'solitary opinions as to the meaning of the law or the Constitution, in opposition to a construction reduced to practice during a reasonable period of time'."[101] In other words, Madison is said to have endorsed liberal constructionism of the Constitution by the Courts in order to adapt it to the changing times. Madison felt that the check

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[96]Ibid.: 98.
[97]Ibid.: 106.
[98]Ibid.: 114. See also David M. O'Brien, "The Framers' Muse:" 270.
[99]David M. O'Brien, "The Framers' Muse:" 275.
[100]George W. Carey, In Defense of the Constitution: 114. Both Carey and O'Brien quote Madison's remark to Edward Everett: "Those who had denied or doubted the supremacy of the judicial power of the U.S. seem not to have sufficiently adverted to the utter inefficiency of a supremacy in a law of the land, without a supremacy in the exposition and execution of the law." One should note, however, that Carey's thesis posits that the Supreme Court has gone beyond Madison's intentions, while O'Brien states that the Court is following the intent of Madison in its judicial activism.
[101]David M. O'Brien, "The Framers' Muse:" 282.

on the judiciary (via impeachment as laid out in Art. II, sec. 4, U.S. Constitution) was sufficient to prevent any abuse of the station, so the court would not "be indulged in a career of usurpation to the decided opinions and policy of the Legislature."[102]

1. Analysis of Madison's Theory of Federalism

How does the federalism of the United States match the model of federalism set forth by Madison? The major problem, according to Madison's contemporaries, was that Madison put too much reliance on human virtue. Patrick Henry, "Brutus" and other anti-federalists held that the Constitution was not stringent enough to prevent the encroachment of the national government into the proper authority of the states. The anti-federalists realized that, if the states were not given an effective check on the national government, their authority and rights would be eroded.

Patrick Henry, at the Virginia Ratification Convention, argued forcefully that the legislation of the Congress was consolidated in nature, leaving the states to tend to the most mundane of tasks:[103]

> But now, when we have heard the definition of it, it is purely national. The honorable member was pleased to say that the sword and purse included everything of consequence. And shall we trust them out of our hands without checks and barriers? The sword and purse are essentially necessary for the government. Every essential requisite must be in Congress. Where are the purse and sword of Virginia? They must go to Congress. What is become of your country? The Virginia government is but a name...We are, as a state, to form no part of the government. Where are your checks? The most essential objects of government are to be administered by Congress. How then, can the state governments be any check upon them?[104]

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[102]George W. Carey, In Defense of the Constitution: 121. The quote was in a letter from Madison to Spencer Roane, 6 May 1821.

[103]Henry cited in Jonathan Elliot, ed., The Debates in the Several State Conventions on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia in 1787, Volume III, 2nd Edition (Philadelphia: J.B. Lippincott Company, 1937 [1836]): 171. This text will be referred to from now on as Elliot's Debates.

[104]Ibid.: 385-396.

Patrick Henry's contention was that the states did not have any effective check on the powers of Congress. If Congress wants to encroach into the sphere of the state, the state has no recourse except to appeal to the Supreme Court. Upon this objection, as well as others, the Constitution was ratified on condition that a Bill of Rights would be added in the form of amendments to the Constitution. One of the end products was the Tenth Amendment, which stated that: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." But, as one of the most cogent anti-federalists expositors opined, the power of the judiciary to interpret the Constitution might ultimately destroy any parchment barrier protecting the states.[105]

The final five letters of "Brutus" were devoted primarily to the subject of judicial review.[106] In Letter Number XI, "Brutus" stated that the "effect of this system of government" would be realized through the "medium of the judicial power."[107] The Supreme Court is, from this perspective, not the "least dangerous" branch, but the branch capable of wielding the greatest power because "no errors they may commit can be corrected by any power, above them, if any such power there be, nor can they be removed from office for making ever

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[105]William Jeffery Jr., "The Letters of 'Brutus'-A Neglected Element in the Ratification Campaign of 1787-88," University of Cincinnati Law Review 40, no. 4 (1971): 643-777. See also Ann Stuart Diamond, "The Anti-Federalist 'Brutus,'" The Political Science Reviewer 6 (1976): 249-281. Jeffrey's article contains all sixteen of the "Brutus" letters. Both Diamond and Jeffery, although differing on the authorship of "Brutus," state that "Brutus" was the most effective of the anti-federalists. In particular, they describe the last five letters of Brutus as almost prophetic in predicting the course of the "least dangerous" of the federal branches. They also state that it was the letters of Brutus which made Hamilton pen the Federalist essays on the same subject, not to refute Brutus, but rather to lessen the impact of Brutus' accusations regarding the latent potential of the Supreme Court.

[106]Although Hamilton wrote the majority of material on the Judiciary in the Federalist Papers, the subject will be briefly touched upon since the judicial branch is the third branch of the federal government, and Madison's views on the judiciary are said to be similar to Hamilton's.

[107]Ibid.: 739.

so many erroneous adjudications."[108] "Brutus" added that the clause extending the judicial branch to all cases in "law and equity" would give the Supreme Court license to "explain the constitution according to the reason [and] spirit of it, without being confined to the words or letter."[109] In other words, "Brutus" anticipated the "loose constructionism" of the court. "The opinions of the supreme court," "Brutus" added, "whatever they may be, will have the force of law" since it would become the last place of appeal. "Brutus" was making a prediction that came true on 29 September 1958, when the Supreme Court, in *Cooper v. Aaron*, ruled that "its interpretations of the written Constitution in a particular case in one State constitute the 'supreme law of the land'."[110]

2. Contemporary Federalism as Compared with the Madisonian Model

Modern analysis of the federal system seems to yield results similar to what the anti-federalists feared. The Constitution does provide an adequate check against the three branches comprising the national government, yet the states, relying on the Tenth Amendment and the good faith of federal officials, do not fare so well. Each of the branches of the national government is briefly examined here to determine the contemporary relevance of Madison's model.

The Legislative branch, when in the ascendancy, can potentially cause the most harm to a federal system if left unchecked for the simple reason that it controls the purse strings and has the power to enact laws. An example of this occurred at the end of the Civil War when the Congress, led by Thaddeus Stevens as Speaker of the House, amended the Constitution with the Fourteenth

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[108]Ibid.
[109]Ibid.: 741.
[110]Robert T. Donnelly, "The Demise of Federalism: With Consent of the Governed?" in Edward B. McLean, ed., Derailing the Constitution: The Undermining of American Federalism (Bryn Mawr, PA: Intercollegiate Studies Institute, 1995): 51-52.

and Fifteenth Amendments.[111] Attached to each of the Amendments was the clause: "Congress shall have power to enforce this article by appropriate legislation." As Felix Morley states:

> Legislation written "to enforce" the Constitution appears itself to possess a certain constitutional sanction. If the executive vetoes such legislation he can be depicted as striking at the Constitution itself, an interpretation which in effect asserts that he has violated his oath of office and is therefore properly subject to impeachment.[112]

Morley asserts that the Fourteenth Amendment was revolutionary due to the fact that it gave "Congress for the first time power to enforce, in all the States, rights as to which it had previously possessed no power to legislate."[113]

The reason the Fourteenth and Fifteenth Amendments were able to be ratified by the states was due to Steven's control of the Congress and the Reconstruction Act. When the Fourteenth Amendment initially came up for ratification by the States, it was overwhelmingly rejected by the southern states. After the initial failure, Stevens introduced the Reconstruction Act, which was vetoed by President Johnson. This veto was overridden by Congress. The Reconstruction Act stipulated that the southern states that had seceded were no longer states (even though they were admitted back into the Union upon ratification of the Thirteenth Amendment) and as such were placed under military rule. Once the military-appointed state legislatures ratified the Fourteenth Amendment, the states were allowed to return to the Union.[114] When

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[111]Felix Morley, Freedom and Federalism (Indianapolis: Liberty Fund, 1981 [1959]): 76-92. See also Raoul Berger, Selected Writings on the Constitution (Cumberland, VA: James River Press, 1987), especially Chapter Seven.

[112]Felix Morley, Freedom and Federalism: 77. One could also hypothesize that the Supreme Court would have a difficult time in checking the abuse of legislation wearing the guise of a constitutional amendment.

[113]Ibid.: 86.

[114]Felix Morley, Freedom and Federalism: 89-91. After Johnson vetoed the Act, Stevens immediately brought impeachment proceedings to bear against him. Morley quotes Ulysses S. Grant: "no doubt [much of the legislation of the Reconstruction Act] was unconstitutional; but it

several of the southern states ratified with an attached dissenting opinion[115] and two northern states withdrew their ratifications, the Congress passed a concurrent resolution declaring that the Amendment had been ratified by twenty-nine states.

Franklin Roosevelt and his New Deal present the example of a presidency that has the upper-hand in the national government. During Roosevelt's tenure, the concept of the federal government assuming more responsibility for the welfare of individuals took root, further undermining the rights of the states.[116] The Roosevelt administration did more to centralize the authority of the states into the national government, and considerably extended the power of the executive branch.[117] Gottfried Dietze claimed that any study of the national executive branch is a study in the aggrandizement of power.[118] During the time of a national crisis, especially with a charismatic leader, the executive can quite easily assume the mantle of the supreme leader in order to be able to deal effectively with a problem.

Among some of the acts introduced by Roosevelt to Congress were the New Deal Acts which were subsequently declared unconstitutional by the

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was hoped that the laws enacted would serve their purpose before the question of constitutionality could be submitted to the judiciary and a decision obtained."

[115]The dissenting opinion, according to Morley, came from the members of the state legislatures who were in the minority in voting against the ratification of the amendment. The opinion stated, in essence, that although the Amendment was ratified, it was ratified by a federally appointed legislature and not by the people of the states. (p. 91)

[116]Felix Morley, Freedom and Federalism: 149. See also Gottfried Dietze, America's Political Dilemma: From Limited to Unlimited Democracy (Baltimore: The John Hopkins Press, 1968): 183-205.

[117]Ibid.: 151. According to Morley, "The power thus vested in the White House and its subordinate agencies was of all sorts--political, economic and social...Political power was drained both from the State governments and from the Congress of the United States. Economic power was drained from business and banking, while social power, in the broad sense of the word, was taken from the localities and concentrated in the new network of alphabetical agencies."

[118]Gottfried Dietze, America's Political Dilemma: From Limited to Unlimited Democracy: 184.

Supreme Court.[119] Next, the President came forth with a proposal that, since the states could not provide adequate pay for the agriculture and labor sectors, the national government would assume responsibility.[120] In view of the dire economic problems facing the country, Roosevelt had no problem in getting Congress to pass the legislation he proposed.

After the Supreme Court decision regarding the constitutionality of the NRA, Roosevelt attempted to "pack the Court" by introducing legislation that would force the retirement of Federal judges and have the President appoint replacements.[121] This would allow Roosevelt to pass the legislation the he desired without any fear of a Supreme Court declaring the legislation unconstitutional. After the failure of the "court-packing" episode, it is said that the onset of World War II was what saved Roosevelt from defeat in the next election.[122] Once World War II was over, the centralization that occurred during the crises of the previous ten years did not go away, owing in part to the onset of the Cold War.

The judicial branch has also gone through stages that have allowed it to gain ascendancy over the other two branches. Chief Justice John Marshall commenced the process of judicial review in *Marbury v. Madison,*[123] which stated that the Supreme Court is the "ultimate interpreter of the Constitution" and that

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[119]Felix Morley, Freedom and Federalism: 155-157. The National Recovery Act (NRA) was struck down because "Its price- and wage-fixing provisions were of course in direct contradiction to the anti-trust laws, as Mr. Roosevelt himself was compelled to admit."

[120]Ibid.: 157. "But by the half-truth of pinning inability to do the impossible on the States alone, Mr. Roosevelt neatly impugned the whole theory of federal government and strongly suggested that he personally would provide these benefits..."

[121]Ibid. Raoul Berger posits that Roosevelt could have avoided the "Court-Packing" scheme by just having the Congress limit the judicial review power of the Supreme Court via Article III of the Constitution, a suggestion which seems highly dubious. See Raoul Berger, Congress v. The Supreme Court (Cambridge, MA: Harvard University Press, 1969): 291-292.

[122]Felix Morley, Freedom and Federalism: 160.

[123]Raoul Berger, Selected Writings on the Constitution: 65.

it is the responsibility of the court to define the boundaries set forth in the Constitution. Robert T. Donnelly contends that there are two watershed cases whereby the court stripped power away from the states, as well as the other two branches in the national government.[124] The first case was *Cooper v. Aaron,* in which the Supreme Court decreed its interpretations to be the "supreme law of the land." The second case was *Garcia v. San Antonio Metropolitan Transit Authority,* where the decision was that "Congress is free under the Commerce Clause to assume a state's traditional sovereign power, and to do so without judicial review of its action."[125] The results of the two decisions, according to Donnelly, are as follows:

> (1) Under the *Cooper* assertion and the Incorporation Doctrine, the Court will sit as a Council of Revision over the states; (2) the Court will no longer defend the states against action taken by Congress under the aegis of the Commerce Clause; and (3) if Congress should undertake to address the parameters of the Fourteenth Amendment, the Court will decide if its articulations are *right* and *good* .[126]

By emphasizing the words "right and good," Donnelly is contending that the Supreme Court no longer makes its decisions using as a framework the Constitution and the original intent of its authors, but the contemporary political views of the Court Justices.

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[124]Robert T. Donnelly, "The Demise of Federalism: With Consent of the Governed?": 50-60. Donnelly's essay contends that there were three key events, two of which involved Supreme Court; the other event was the ratification of the Seventeenth Amendment, which stipulated the election of U.S. Senators by popular vote, instead of through the state legislatures. It can be argued that this was not a watershed event for two reasons. First, the Amendment was ratified by at least three-fourths of the states, without the coercion that occurred with respect to the Fourteenth Amendment, and the states, and the citizens thereof, had at least a modicum of knowledge of the ramifications of the Amendment. Secondly, in the field of original intent, quite a few of the Framers were against the idea of putting the Senators above the direct reach of the voters; the Connecticut Compromise was a last minute effort to achieve a consensus at the Convention. See Forrest McDonald, E Pluribus Unum: 276-307.

[125]Robert T. Donnelly, "The Demise of Federalism: With Consent of the Governed?": 54.

[126]Ibid.: 58. Emphasis in the original.

Raoul Berger, an eminent constitutional historian, has provided an excellent account of the rise of judicial activism, especially in the past half century.[127] Berger gives as evidence six instances in which (according to his analysis) the Supreme Court overstepped its constitutional boundaries: *Bridges v. California,* The Reapportionment Cases, *Brown v. Board of Education, Williams v. Florida, Shapiro v. Thompson* and the Death Penalty Cases.[128] In each of these cases, the sphere intruded in is that of state sovereignty. Berger has declared that the continuance of this process is due to "the doctrine of judicial squatter sovereignty--usurpation is legitimated by long-standing repetition."[129] In Berger's view, the court has taken over decision-making that was, under the Constitution, to be left to the legislative branch and the states; and Congress and the Executive have accepted these rulings.[130]

There are two main trends noted in the above analysis. First, the tension in the national government between the three branches has been fairly stable for the past two hundred years. The one branch that seems to have gained more power over the other two is the Judicial Branch. That is not to say that the other two branches did not also aggrandize their own power; they did so, at the cost of the sovereignty of the states. The erosion of state rights has been a steadily evolving process. Madison was correct in stressing the need for a separation of powers in the national government. But since the states did not have the power

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[127]Ibid., Chapter XII, "The Activist Legacy of the New Deal Court:" 263-291.
[128]Ibid.: 266-273. Emphasis in the original.
[129]Ibid.: 266.
[130]George W. Carey, In Defense of the Constitution: 137. Carey adds: "And, because of the new morality concerning the sanctity of the Court, there is no one, not even the President, to say it 'nay.' To do so would create a political turmoil of immense proportions."

of redress to prevent encroachment of the national government in the Constitution, their initial authority was greatly reduced.[131]

B. CARL FRIEDRICH AND FEDERALISM

A twentieth century federal theorist, Carl Friedrich, defines federalism as the:

> process by which a number of separate political communities enter into arrangements for working out solutions, adopting joint policies, and making joint decisions on joint problems,...[132]

Friedrich makes clear from the outset that state sovereignty (in the sense of the political autonomy of the component units) does not exist in a federal system.[133] The sovereignty of a nation, upon entering the federation, dissolves into what Friedrich describes as "constituent power." The duality of sovereignty that Madison championed in *Federalist Number Thirty-Nine* is therefore a *non sequitur* in Friedrich's conceptual framework. Therefore, if the sovereignty is not dualistic[134], and does not reside in the states, then logically it must be based in the national government. Friedrich makes a distinction between autonomy and sovereignty; he seems to define autonomy as a characteristic that enables the "constituents" to have a say in the matters of the federation. No single entity is

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[131]John Taylor of Caroline in Tyranny Unmasked (Indianapolis, IN: Liberty Fund, 1992 [1822]), put it succinctly: "[suppose] that the first Congress under the present constitution, had published a declaration in the following words: Congress has power to assume the State debts...to model State constitutions, to legislate internally without restriction,...No State can pass any law which shall contravene a law of Congress. No State possess a right of self-defence against encroachments of the Federal government. The Supreme Court can abrogate any State law and reverse any State judgment. It can regulate and alter the division of powers between the States and Federal governments; and it can constitutionally execute unconstitutional Federal laws by which State rights are infringed...Yet all these blows have been successively given to our theory; proving that the gradual and piecemeal mode of destroying it [the constitution], and for substituting a tyranny in its place, is the most dangerous because it is the least alarming" (pp. 210-211).

[132]Carl J. Friedrich, Trends of Federalism in Theory and Practice (New York: Frederick A Praeger, 1968): 7.

[133]Ibid.: 8. Friedrich states that "[n]o sovereign can exist in a federal system."

[134]Friedrich calls the Madisonian concept a "constitutional myth."

to have the "last word;"[135] therefore sovereignty is not an issue. Friedrich then states that federalism is an evolutionary process that goes through several distinct stages.

The first stage is "dual federalism;" this stage seems to be marked by a distinct separation between the participating entities and the central authority.[136] The second stage is labeled "centralizing federalism;" in this stage, a certain amount of "autonomy" is transferred from the component entities to the central authority. The third stage is "cooperative federalism." Friedrich defines this as "a design in which *both* federal and state authorities resume a policy of extending governmental control and regulation, and, in doing so, were pushed to collaborate in the execution of those policies."[137] The last stage that Friedrich provides is labeled "creative federalism." This stage is marked by a mobilization of "private interests as well as public agencies in intergovernmental affairs."[138]

Indeed, Friedrich states that federalism in the United States has undergone a process of centralization, with the major dominance emerging on the side of the national government. This process was caused by three factors: the Supreme Court's broad interpretation of the Constitution (and also, one can argue, its judicial activism), the federal legislation slowly encroaching on the states' reserved powers (Friedrich calls the reserved powers the residual powers), and what Friedrich calls the "exertions" of the federal executive.[139] This process was greatly accelerated after the Civil War, and carried even further with the Wilson

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[135]Ibid.

[136]Ibid. Friedrich, unfortunately, does not give definitions to the stages. Instead, he attaches the stage to a period of history and leaves it to the reader to discover what the definition is.

[137]Ibid.: 27. Emphasis in the original.

[138]Ibid.

[139]Friedrich, Trends of Federalism: 23. One could make the case that the process whereby the loyalty of the citizens shifted exclusively to the federal government, from 1930 onwards, was an example of functionalism.

administration's "New Freedom,"[140] the New Deal of Franklin D. Roosevelt, and the "Great Society" of Lyndon B. Johnson.

According to Friedrich, four factors determine the character of the federal order: nationalism, economic activity, religion and class structure.[141] Nationalism is defined as the national feeling of what constitutes a Frenchman, a Briton or a German. Friedrich states that federalism "provides the only voluntary approach to the task of coordinating disparate national elements."[142] The proper representation of the member in the federal system is "by providing channels for inter-group communications, by delaying precipitate action and offering a stage for inter-group compromise."[143] Friedrich furthers explains that a "federal order is the only way to protect"[144] the cultural and social uniqueness of each member.

The problem of economic activity is defined as different areas having predominantly different types of economies. For example, industrialized northern Europe differs from agrarian southern and eastern Europe. Friedrich leaves class structure undefined, except to the extent that he refers to the federal order being able to reconcile differences between "peasants," "landlords," and the like.[145] The problem of religion is self-evident, and as Friedrich points out, this category can be the cause of great conflict under certain conditions. The main solution proffered by Friedrich to all of these problems is to shift the boundaries of the federal members so as to lessen the impact of the problem on each member. For example, Friedrich would shift the boundaries where the

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[140]Ibid.: 27.
[141]Ibid.: 55.
[142]Ibid.: 34.
[143]Ibid.: 39.
[144]Ibid.: 53.
[145]Ibid.: 57.

industrial sector had a predominance over the agrarian sector; in that way, Friedrich would argue, the agrarian interests would have appropriate representation in government.[146] The same problem-solving solution could be applied to the area of religion as well, according to Friedrich.

The operation of the federal system can be of either two modes, explains Friedrich. The first mode is "delegated administration,"[147] and the second is "centralized administration." Friedrich does not go into an explanation of the "centralized administration," but one can surmise that it is a federalism that gives little authority to its members. The "delegated administration," on the other hand, offers three advantages: it avoids duplication, local agencies apply federal legislation, and the national government draws on the expertise of the local governments.[148] The decisions made by the national government are to be handed to the local governments to be executed, provided that the local governments execute the federal laws to the satisfaction of the national government. Friedrich states that "safeguards are needed to ensure that the federal supervision does not turn into control of the local sphere of competence and jurisdiction."[149]

Friedrich holds that a federation can only be truly successful if it has a "federal spirit" or "federal behavior."[150] This spirit is defined as a tendency to want to compromise in order to keep the greater good, the federal compact, in good order; this is also called "federal comity,"[151] or the willingness to compromise. A part of federalism that Friedrich explains briefly (and that was

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[146]Ibid.: 55-57.
[147]Ibid.: 70-75.
[148]Ibid.: 73.
[149]Ibid.
[150]Ibid.: 39, 175-176.
[151]Ibid.

also a major point of contention in the Maastricht Treaty) is social planning. Friedrich states that the national government could, and indeed should, "give guidance and coordination of the community's economic activities." This guidance is to come in the form of "an over-all program" which is mandated by the popularly elected representatives.[152] Friedrich conducted many case studies of federalism, but this thesis limits its analysis to the case study of European federalism.

1. "United Europe - An Emergent Federal Order?"

Friedrich treats the European case as a special case for the student of federalism.[153] The essential factor that Friedrich touches upon is the fact that the Europeans cannot achieve economic union without first achieving political union, and as yet there are no federal bodies within the European Community.[154] The path to a federal Europe, Friedrich contends, has been a process of starts and stops. Political and economic factors are holding up the federalizing process, while the cultural aspects tend to promote to a more unified Europe.[155]

Friedrich argues that Europe is becoming more unified at the "grass roots" level, where the common attitude includes hopes for a united "Europe with a common citizenship and common foreign and security policy." These grass roots level organizations, while displaying "loose bonds," are important, because they break down the barriers of national sovereignty.[156] The concept of sovereignty is seen as an "outworn" issue that is not effective in solving the problems of society.

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[152]Ibid.: 42.
[153]Ibid.: 156.
[154]Ibid.: 157. See also Josef Joffe, "The New Europe: Yesterday's Ghosts," Foreign Affairs (1993): 29-43; Wilhelm Röpke, "European Economic Integration and its Problems," Modern Age (Summer 1964): 231-244 for similar viewpoints.
[155]Carl Friedrich, Trends of Federalism: 158.
[156]Ibid.: 159

Friedrich contends that, "if sovereignty is allowed to intrude itself into the federal relationship in its old absolute sense of an unlimited competence to determine its own range of competencies, as is de Gaulle's inclination, then it becomes destructive to the federal relationship."[157] Sovereignty is seen as a characteristic of a "weak federal spirit." The European Community at the time of Friedrich's analysis (the late 1960's) resembled the period in which the German principalities were reluctant to join in a federation with Prussia under the rule of Bismarck.[158] Friedrich concludes that the European Community will not be successful until it widens its federal membership.

2. Analysis of Friedrich's Theory of Federalism

Friedrich is eloquent regarding the broad philosophical reasons why nations should federate. "It [federalizing] unites without destroying the selves that are uniting and is intended to strengthen them [the member states]."[159] But an essential element is missing: protection of state sovereignty. All through his discourse, Friedrich contends that sovereignty is a "nebulous concept" that only hinders the process of federalization. Friedrich argues that federalization needs to come from the will of the people, yet he also states that boundaries need to be redrawn in order to prevent a majority interest from forming.

Several inconsistencies should be mentioned in this regard. First, Friedrich states that the shifting of boundaries can solve the problems of economic and religious differences. Yet it would seem that no nation would shift its borders within the federal system voluntarily; and it is the voluntary nature of the federal system which sets it apart from an empire. The second inconsistency is that even if one could shift the boundaries of the members, doing so might

[157]Ibid.: 159-160.
[158]Ibid.: 160.
[159]Ibid.: 177.

solve one problem, but cause additional problems. For example, if the boundary of one country was changed to take in the industrial sector of another (e.g., hypothetically, the Saarland going to France to increase Frances's industrial sector), the people of the Saarland would then be a cultural and religious minority in France. Friedrich makes the statement that West Germany made internal boundary changes at the end of World War II to lessen problems of economic and cultural differences, but one must remember that West Germany was then under military rule, and the federal system was not necessarily a voluntary coming together of the *Länder*.

The case study offers an accurate depiction of the evolution of the European Community. Yet Friedrich's thoughts on the future of European federalism sound a bit like neo-functionalism (discussed in the previous chapter). "It is possible to let such a relationship [the federalizing of the EEC] evolve, and to solve specific problems as they emerge."[160] To give the federation a permanent form is to prevent the pragmatic problem-solving of the present issues. Friedrich's "cooperative federalism" is defined as political centralization by others.[161] Another inconsistency is apparent in Friedrich's argument that Germany overcame similar problems of federalization in the late nineteenth century. Germany under Bismarck was not, however, an example of the popularly mandated federalism that Friedrich advocates. "German Unity had not come...'from below', but by a treaty between princes, 'from above'."[162]

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[160]Ibid.: 159.

[161]Friedrich's labels the New Deal as "cooperative federalism," while Felix Morley describes it as one of the greatest instances of political centralization and nationalization in United States history. See Felix Morley, Freedom and Federalism (Indianapolis: Liberty Fund, 1981 [1959]).

[162]Arno Kappler, Ariane Grevel,, eds., Gerard Finan, trans., Facts About Germany (Frankfurt, Societät-Verlag, 1993): 90.

Friedrich adheres to federalism as one of the few political methods--if not the only one--to bring about the integration of members while at the same time preserving the distinctive social and cultural values that the members bring into the federal system. Yet, at the same time, Friedrich argues that the members are to have limited autonomy in that they will only be able to carry out federal laws. The members are expected to show loyalty to the over-all needs of the federation.[163] Problems can be overcome by more "cooperation" from the federal members and the national government.

C. CONCLUSION

Both Madison and Friedrich, display ambivalence regarding the ultimate protection of the rights of the states operating in the federal compact. Friedrich makes the assertion that the states surrender all sovereignty in exchange for "constituent power." The national government is the ultimate arbitrator in matters legislative and judicial.[164] The dualistic nature of the Madisonian model is easily supplanted by a more centralized government during times of national stress. As history has shown, once power is given to the national government during crises (e.g., the Civil War, World Wars I and II, and the Great Depression), the national government is extremely hesitant to relinquish the powers and restore them to the states. When scholars examine the case of the United States, they generally see the pattern of an erosion of state sovereignty until, over time, the state's role is substantially diminished, and the

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[163]Ibid.: 175.

[164]A.V. Dicey and Raoul Berger both state that in the area of judicial review, the states have just as much authority to declare federal laws unconstitutional as does the Supreme Court. But since the states did not have this role explicitly delineated in the Constitution, the Supreme Court quickly supplanted that position. See A.V. Dicey, An Introduction to the Study of the Constitution (Indianapolis: Liberty Fund, 1982 [1885]): 88 ; and Raoul Berger, Congress v. the Supreme Court (Cambridge, MA: Harvard University Press, 1967): 258.

state serves as an administrative unit of the national government, at least for some purposes.

With the tradition of national sovereignty firmly entrenched in the ethos of many Europeans, the idea of a federation in which today's nations would be reduced to administrative units is extremely distasteful. This became apparent after the signing of the Maastricht Treaty. The citizens of the nations, once they became cognizant of the potential loss of sovereignty, became increasingly ambivalent towards the treaty, despite efforts by the national heads of government to reassure them that the Treaty would not affect their national interests.

In the 1996 Maastricht review conference, the trepidations of the European citizens will come to the forefront once again. If they are not reassured that the formation of an ever-closer union will not irrevocably steal away their national sovereignty and identity either outright or like a "thief in the night," the prospect that some of the member nations would simply walk away from the union, or that the union would fall short of its professed objectives, with some members claiming a "liberum veto," is great.

The U.S. experience with federalism suggests that the central government tends to gain power at the expense of the states. This experience may not be particularly encouraging to citizens of nations in the European Union who remain attached to national autonomy and sovereignty--hence, the opposition to federalism that some articulate, notably in the United Kingdom.

IV. THE THEORY OF CONCURRENT MAJORITY

Let it never be forgotten, that power can only be opposed by power, organization by organization: and on this theory stands our beautiful federal system of Government. [165] *(John C. Calhoun)*

In the first half of the nineteenth century, there arose a statesman from South Carolina, who, according to the vast majority of historians, was the greatest political-philosopher and statesman in the period. The man was John Caldwell Calhoun. Intellectually, Calhoun had no peer in or out of government. With his studies in logic and rhetoric at Waddell's Academy, combined with the education at Yale and Litchfield Law School, Calhoun trained his gifted mind into an analytic tool to develop probably the most innovative theory of a representative system of government in American history.[166]

The focus of this chapter will be the political philosophy of John C. Calhoun as it pertains to states-rights, sovereignty and minority representation and protection. Richard Hofstadter, in *The American Political Tradition,* stated that Calhoun's "concepts of nullification and the concurrent voice have little more than antiquarian interest for the twentieth-century mind."[167] Yet, it is this very concept of minority protection and representation in the political arena that is attracting attention. As one observes the political landscape in Europe, one can

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[165]John C. Calhoun, "Speech on the Revenue Collection [Force] Bill, 15-16 February 1833," Union and Liberty: 453-454.

[166]Russell Kirk, The Conservative Mind: From Burke to Eliot, 7th Revised Edition (Chicago: Regnery Books, 1987). Kirk adds that Calhoun's *Disquisition* was "one of the most sagacious and vigorous suggestions ever advanced by American conservatism" (p. 181). Vernon L. Parrington's Main Currents in American Thought, Volume II: 1800-1860 - The Romantic Revolution in America (Norman, OK: University of Oklahoma Press, 1987), agrees with Kirk in that he ranks Calhoun with John Adams as one of the greatest original American political thinkers. Parrington adds that of the three great political leaders from 1812 to 1850: Daniel Webster, Henry Clay and John Calhoun, Calhoun "proved himself intellectually the greatest of the three" (p. 69). See also William D. Peterson, The Great Triumvirate: Webster, Clay and Calhoun (Oxford: Oxford University Press, 1987).

[167]Richard Hofstadter, The American Political Tradition: And The Men Who Made It (New York: Alfred A. Knopf, 1962): 68.

see that the concept of representation in government and the protection of minority rights is at the forefront of political thought. As is evident from the recalcitrance of a growing number of people in European Union countries regarding the aim of "an ever closer union," statesmen are still struggling with the conundrum of maintaining an effective and cohesive political entity while allowing the sovereignty of the parts to remain intact.

The chapter is not intended to cover the earlier period of Calhoun's political career as a Congressional War Hawk and Secretary of War. The chapter first discusses the roots of Calhoun's ideas on states-rights and sovereignty, and then turns to the events in his career which had the greatest impact on his views (e.g., the "Patrick Henry/Onslow" Debates and the Nullification Crisis of 1833). It is important to examine the events that shaped Calhoun's ideals, for they reveal how practical experiences helped to formulate the theory of concurrent majority. Finally, Calhoun's political philosophy, as expressed in his *Disquisition on Government* and *Discourse on the Constitution and Government of the United States,* is analyzed. The chapter concludes with a discussion of the significance of Calhoun's writings for contemporary European politics.

Calhoun's interest in decentralized government probably stemmed from the influence of his father, Patrick Calhoun. Patrick Calhoun, a Scotch-Irish immigrant, settled in the upcountry of South Carolina in the latter half of the eighteenth century, becoming a leading figure in the community, including politics. As a representative in the South Carolina ratifying convention, Patrick Calhoun voted against the United States Constitution, arguing that it was not right for politicians outside the state to have the power to tax people in the state. It was also Patrick Calhoun who was instrumental in obtaining representation for the upcountry citizens in the lower chamber of the state legislature. The legacy

of Patrick Calhoun, as well as the culture "based on faith in family farms and family Bibles, in the dignity of individuals and the indignity of class distinction, in close-knit communities, militant morality, and uninhibited free enterprise," shaped Calhoun's philosophy.[168] The republican ethos of small government and the liberty of the individual was thus communicated to Calhoun from the earliest age.

A. THE PATRICK HENRY/ONSLOW LETTER CONTROVERSY

Calhoun's first pointed stand on the strict construction of the Constitution occurred in 1826 with the "Patrick Henry/Onslow Letters." The letters were a series of debates between Calhoun (under the pseudonym of "Onslow," a famous orator in the British House of Commons) and Philip Fendall, "a clerk in the Department of State who wrote with [President John Quincy]Adam's blessing" (under the pseudonym "Patrick Henry"). The letters appeared in various Washington newspapers.[169]

The debate arose from the duel between Henry Clay, the Secretary of State, and Senator John Randolph of Roanoke, Virginia.[170] "Patrick Henry," in the opening salvo, declared that Calhoun, as President of the Senate, had failed utterly in his duties in not calling Randolph to order for his remarks and accusations against the President and Secretary of State. The ensuing debate was thus said to have taken place on two levels of thought. The first level was common sense. "Patrick Henry" was correct, according to Jefferson's manual of

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[168]Irving Barteltt, Calhoun: A Biography (New York: W.W. Norton & Company, 1993): 21.
[169]Ibid.: 134
[170]The duel was the result of a speech by Randolph in which he made the remark that President Adams and Secretary Clay were engaged in a "corrupt bargain" and that the two made a coalition akin to "Blifil and Black George...the puritan with the black leg." (The speech can be found in Russell Kirk John Randolph of Roanoke (Indianapolis: Liberty Fund, 1978): 439-472). The name "black leg" was apparently repugnant enough for Clay to call Randolph to a duel, which ended without injury to the parties involved.

parliamentary proceedings for the Senate, that Calhoun should have done something to prevent Randolph from excoriating Adams and Clay . The second level, and the level where Calhoun displayed his mastery on the subject, was that on the philosophical meaning of implied and expressly delegated powers. "Patrick Henry's" argument on the implied powers was that "the power of preserving order, and repressing irregularity, are constitutionally attached to the office of President of the Senate by the *People* who created that office."[171] This meant that the Senate, although allowed by the Constitution to determine its own proceedings, was placed under the ultimate control of the Vice President, acting as President of the Senate. "Patrick Henry" thus summarizes:

> 1st. That the power and duty of preserving order are constitutionally attached to the office of the President of the Senate, by the People who created that office. 2nd. That the Senate, whatever else it may do under the clause of the Constitution, authorizing it to "to determine the rules of its proceedings," cannot devest [*sic*] its presiding officer of this power, nor exempt him from this duty. 3rd. That the Senate has never attempted to do so, but on the contrary, has borne testimony to the Constitutional character of that officer.[172]

"Patrick Henry" then gave examples in the history of the British House of Commons, as well as the House of Representatives, to defend his assertion that the Vice President had the authority over the Senate that the Speaker had over the House of Representatives.

Calhoun, as "Onslow," in his rebuttals, asserted that nowhere in the Constitution was it stated that the Vice President had express authority to call to order Senators in the course of debate. The President of the Senate "has no inherent power whatever, unless that of doing what the Senate may prescribe by

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[171]"Patrick Henry, published on August 5, 1826" in The Papers of John C. Calhoun, Volume X Robert O. Meriwether, Edwin W. Hemphill, and Clyde N. Wilson *et al.*, eds. (Columbia S.C.: University of South Carolina Press, 1978): 175. This title will be referred to from now on as the Calhoun Papers. The introduction to Volume X offers an excellent analysis of the Debates.
[172]Ibid.: 184.

its rules, be such a power. There are, indeed, inherent powers, but they are in the *body*, and not in the *officer*."[173] Calhoun stated that the Vice President, as a ruler of the Senate, would tear down the separation of powers in the government that the founding fathers had so wisely erected. The Vice President, not being answerable to the Senate, could then control the manner of debate to prevent the body from debating anything contrary to the Executive Branch.

> You thus introduce *the President,* as it were, into *the Chamber of the Senate, and place him virtually over the deliberation of the body, with powers to restrain discussion, and shielding his conduct from investigation.*[174]

Calhoun considered the liberties gained by the separation of powers too precious to be sacrificed for the exigencies of the moment. To Calhoun, the only way to protect the separation of powers was to adhere strictly to the Constitution; not, as "Patrick Henry" advocated, to imply that the Vice President has supreme power over the body. "Patrick Henry" even went so far as to add that the Senate (and House) should always have committees favorable to the views of the administration, for it is the administration that has the "wisest and most patriotic suggestions" concerning the plans for "public welfare."[175]

Calhoun concluded the series of debates by stating that: first, the Vice President receives his presiding powers from the Senate, not from his position as the Vice President. Secondly, that "the rules themselves must determine, not only whether the power exists, *but in what manner;* for it is just as illegal to exercise power in a manner different from what it is delegated, as it is to exercise that not delegated at all."[176] Calhoun argued that loose construction of the Constitution would ultimately result, not only in the loss of the Senate as an

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[173]"Onslow to Patrick Henry, Published on 27 June, 1826," Calhoun Papers, Volume X: 139.
[174]Ibid.: 145. Emphasis in the original.
[175]"Patrick Henry, Published on 8 August, 1826," in Calhoun Papers, Volume X: 191.
[176]"Onslow to Patrick Henry, published on 7 October, 1826," in Calhoun Papers, Volume X: 211.

independent deliberative body serving as a check on the Executive and the House, but also in a loss of liberty to the People.

The man responsible for the debates, John Randolph, was the one person, who, as Calhoun's peer, had the greatest influence in converting Calhoun from National Republicanism to States-Rights Republicanism.[177] Randolph, the eccentric genius from Virginia, was the leader and orator of the *Tertium Quid* (The Third Factor) or Old Republicans. Randolph, along with John Taylor of Caroline,[178] led the statesmen in the first part of the nineteenth century that adhered strictly to the precepts of the agrarian-republican, anti-federalist Founding Fathers; they had a deep belief in strict adherence to the Constitution. Echoing the anti-federalist "Brutus,"[179] Randolph argued that the greatest threat for the Federal Republic was the broad interpretation of the Constitution. Randolph was vehemently against using the needs of the moment, be it to build roads for internal improvements or to create a Bank of the United States, as an excuse to by-pass the proper boundaries set forth by the Constitution. Although,

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[177]Russell Kirk, John Randolph of Roanoke: A Study in American Politics (Indianapolis: Liberty Fund, 1978): 99. This book contains many of Randolph's most important letters and speeches. Kirk adds that this process actually started in 1816, when Randolph made his Speech on the Treaty Making Power, on January 10, 1816; see also pp. 100-115. Kirk here quoted Charles W. Wiltse in John C. Calhoun, Nationalist (Indianapolis, 1935) in stating "Randolph's answer was one which Calhoun passed over at the time, but to which he paid tribute many years later." Kirk also uses Henry Adams as a source by stating that "John Randolph stands out in history as the legitimate and natural precursor of Calhoun." See Henry Adams, John Randolph (Boston and New York, 1882).

[178]If Randolph was considered the orator for the *Tertium Quid*, John Taylor was considered the theoretician and writer for the group. Some of Taylor's works on the subject include: Constructions Construed and Constitutions Vindicated (Richmond: Shepherd and Pollard, 1820), New Views of the Constitution of the United States (Washington: Way and Gideon, 1823), and Tyranny Unmasked (Indianapolis: Liberty Fund, 1992 [originally published in 1822]). For an excellent introduction to John Taylor, see M.E. Bradford's essay, "A Virginia Cato: John Taylor of Caroline and the Agrarian Republic," in John Taylor, Arator (Indianapolis: Liberty Fund, 1977 [originally published in 1818]).

[179]William Jeffery, Jr. "The Letters of 'Brutus'--A Neglected Element in the Ratification Campaign of 1787-88," University of Cincinnati Law Review 40, no. 4 (1971): 643-777. "Brutus" argued that the federal legislature, being the sole judge of what is necessary for the common welfare, would eventually lead to a consolidated nation usurping the rightful sovereignty of the states.

as Russell Kirk points out, Randolph did not have the veneration for the Federal Republic and the Constitution that Calhoun had, Randolph was instrumental in sharpening Calhoun's perceptions of the dangers of consolidation, including the loss of state sovereignty.

B. THE NULLIFICATION CRISIS

The next major political event in Calhoun's career, and the event that catapulted him into the staunch states-rights camp for the remainder of his career, was the Nullification Crisis of 1830 - 1833.[180] The Nullification Crisis centered around the Tariffs of 1824, 1828, and 1832. The planters of South Carolina claimed that the tariffs on imports were financing the Northern manufacturing interests at the expense of the South.[181] The economic depression in South Carolina, along with the tariffs, created an atmosphere of growing sectionalism. The citizens of South Carolina were starting to feel that if they were not adequately represented in the Congress, they might be better off outside the Union. As Vice President of the United States in 1824 and 1828, Calhoun watched as the Tariff bills were passed against the will of the southern agrarian interests. To the southerners, the South Carolinians in particular, the bill represented a continuing usurpation of their livelihood at the hands of the northern manufacturing interests.[182] This animosity led to a growing secessionist movement, which gained popularity in Calhoun's state of South Carolina. Calhoun, not wanting disunion, advocated instead the use of "a veto on the part

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[180]For an excellent account of the Nullification controversy, see William W. Freehling, Prelude to Civil War: The Nullification Controversy in South Carolina 1816-1836 (New York: Harper & Row, Publishers, 1966).

[181]Ibid.: 25-48. Freehling makes the case that the problem, although exacerbated by the tariffs, was also the result of a slump in cotton prices, a recession, and the fact that the majority of the planters were heavily in debt due to real estate over-expansion in an earlier boom cycle.

[182]Irving Barteltt, Calhoun: A Biography (New York: W.W. Norton & Company, 1993): pp. 142-143.

of the local interests, or under our system on the part of the states."[183] Calhoun's theory on the principle of nullification was then put to paper in the *South Carolina Exposition and Protest*.[184]

The idea of putting forth grievances against the overstepping of constitutional authority by the federal government was not original in Calhoun's work. This idea originated from the Virginia and Kentucky Resolutions of 1798, penned by James Madison and Thomas Jefferson respectively.[185] The Resolutions were a protest against the national government.[186] They argued that the Alien and Sedition Laws not only exceeded the legitimate authority of the government, but also, in the case of the Sedition Act, expressly violated the Constitution. The resolutions from the Hartford Convention of 1814 constitute

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[183]Ibid.: p. 144.

[184]John C. Calhoun, "South Carolina Exposition and Protest," Union and Liberty (Indianapolis, IN: Liberty Fund, 1992): pp. 311-365. As Vice President of the United States, Calhoun allowed discretion to be the better part of valor and did not attach his name to the document, although it was widely speculated that he was indeed the author. See also Bartlett, Calhoun: A Biography: pp. 139-152; Pauline Maier, "The Road Not Taken: Nullification, John C. Calhoun, and the Revolutionary Tradition in South Carolina," South Carolina Historical Magazine 82 (January 1981):1-19; and Lacy K. Ford Jr., "Inventing the Concurrent Majority: Madison, Calhoun and the Problem of Majoritarianism in American Political Thought," The Journal of Southern History 55, no. 1 (Feb. 1994): 19-58.

[185]Both Resolutions can be found in David B. Mattern, J. C. A. Stagg, Susan Holbrook Perdue and Jeanne K. Cross, *et al.*, eds., The Papers of James Madison, Volume XVII (Charlottesville, VA: University Press of Virginia, 1991). This work will be referred to from now on as Madison Papers. See also James Madison, "The Report of 1800", Madison Papers, where Madison ably defended both of the Resolutions and presented a formidable critique of the Alien and Sedition Laws. Lacy K. Ford Jr., in "Inventing the Concurrent Majority," adds that Madison, upon reading Calhoun's *Exposition* and *Fort Hill Address*, commented that he had never advocated in any of his earlier writings the concept of nullification. Jefferson, on the other hand, in a revised Kentucky Resolution of 1799, explicitly declared that a state had the right to nullify a law that had the potential to do evil against the state. See "The Kentucky Resolutions of 1799," Speeches and Documents in American History, Volume I, Robert Birley, ed. (London: Oxford University Press, 1962): 249-251.

[186]Throughout Calhoun's writings, as with many authors of that period, the term 'general government,' is synonymous with the term federal government.

another example of written grievances against the national government prior to the Nullification Crisis.[187]

Although the tariff passed on 19 May 1828, Calhoun's *Exposition* was essentially the start of his theoretical work on the principles of states-rights, sovereignty and concurrent majority. Throughout this phase of Calhoun's career, he still remained a staunch supporter of the Union, for he knew that if the Union did come apart, it would inevitably lead to anarchy. In 1831, when the secessionist movement in South Carolina gained momentum, Calhoun wrote the *Fort Hill Address* [188] to direct his fellow citizens on a much more moderate path. In this address, as well as in his letter to South Carolina Governor James Hamilton,[189] Calhoun solidified his position that it is the States that have the ultimate sovereignty over the decisions within their borders. From the beginning, with the ratification of the Constitution of the United States, it was the States, which acted as independent sovereigns, that brought the Constitution into existence.[190] Calhoun then argued that, since the States have the final arbitration over their welfare, the States have the right as co-equals with the General Government, to:

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[187]The Hartford Convention was the result of the Embargo Act during the War of 1812. The Act was a major economic setback for the New England merchants, and as a result, the war was extremely unpopular in that region. The resolutions stated that "it be and hereby is recommended to the legislature of the several States represented in this Convention, *to adopt all such measures as may be necessary effectually to protect the citizens of said States* from the operation of all Acts which have been or may be passed by the Congress of the United States, which shall contain provisions, subjecting the militia or other citizens to forcible drafts, conscriptions, or impressments, *not authorized by the constitution of the United States*." Speeches and Documents in American History: 282-287 (emphasis added). It is interesting to note that a great opponent of the War of 1812, one who recommended state interposition, was Daniel Webster, Calhoun's great opponent in the Senate during the Nullification Crisis. See Merrill Peterson, The Great Triumvirate: 43-44.

[188]"The Fort Hill Address: On the Relation of the States and Federal Government, July 26, 1831", Union and Liberty: 367-400.

[189]"Letter to James Hamilton Jr., (Governor of S.C.) August 28, 1832", Calhoun Papers: 613-649.

[190]Ibid.: pp. 615-616.

> judge of its powers, with a negative or veto on the acts of others, in order to protect against encroachments, the interests it particularly represents: a principle which all of our [state] constitutions recognize in the distribution of power among their respective departments, as essential to maintain the independence of each; but which, to all who will duly reflect on the subject, must appear *far more essential, for the same object, in that great and fundamental distribution of powers between the states and General Government* .[191]

When confronting the possible dilemma of a state abusing the power of the veto, Calhoun declared that he did "not claim for a State the right to abrogate an act of the General Government. It is the Constitution, that annuls an unconstitutional act."[192] Calhoun held that the States in the federal compact have a duty to abide by the provisions of that compact. If a State claims that a law is unconstitutional and thereby nullifies that law, the remaining States--if a three-fourths majority is found--can amend the constitution, thereby making that previously nullified law constitutional, thus taking away the grounds of unconstitutionality of the nullifying State.[193] This, according to Calhoun, is the concurrent majority in operation.

The political dénouement for Calhoun during the Nullification Crisis came during the debates on the Force Bill. The Force Bill was introduced to counter South Carolina's Nullification Ordinance of 1833. The Ordinance stipulated that the tariffs of 1828 and 1832 were unconstitutional, null and void, that therefore the citizens of the State were not required to pay the customs on imports, and that they had the right to retrieve goods (in which duties were not paid) held by the U.S. Customs officer.[194] The Force Bill countered the Ordinance by stating that duties must be paid prior to receipt of goods, and what is more important, reiterated that the President had the authority to use the Navy and the Army

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[191]"Fort Hill Address," Union and Liberty: p. 376. Emphasis added.
[192]"Letter to James Hamilton Jr.," Calhoun Papers: p. 317.
[193]Ibid.: p. 636.
[194]William W. Freehling, Prelude to Civil War: 261-263.

against the citizens of South Carolina "without issuing a prior proclamation warning insurgents to disperse."[195]

The introduction of the Force Bill on the floor of the Senate led Calhoun to introduce a set of resolutions pertaining to the relation of the National Government and the States,[196] followed by a two-day speech.[197] The resolutions, in declaration against the Force Bill, were as follows:

> 1. That the people of the several States composing these United States are united as parties to a constitutional compact, to which the people of each State acceded as a separate sovereign community...
> 2. ...and that whenever the General Government assumes the exercise of powers not delegated by the compact, its acts are unauthorized, and are of no effect; and that the same Government is not made the final judge of the powers delegated to it, since that would make its discretion, and not the Constitution, the measure of its powers; but that, as in all other cases of compact among sovereign parties, without any common judge, each has an equal right to judge for itself, as well of the infraction as of the mode and measures of redress.
> 3. That the assertions... [that the United States was an unitary nation and not a federal republic composed of sovereign states] are not only without foundation in truth, but are contrary to the most certain and plain historical facts,... and that all exercise of power on the part of the General Government...claiming authority from so erroneous assumptions, must of necessity be unconstitutional, must tend directly and inevitably to subvert the sovereignty of the States, to destroy the federal character of the Union, and to rear on its ruins a consolidated Government, without constitutional check or limitation, and which must necessarily terminate in the loss of liberty itself.[198]

The purpose of the resolutions was to make the debate on the Force Bill a matter of principle to be decided upon once and for all.[199] For Calhoun, it was a chance to build his inverted pyramid of logic (that is, he started with one premise and then expanded his argument based upon that premise). If the Senate would

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[195] Ibid.: 284-286

[196] "Speech Introducing Resolutions Declaratory of the Nature and Power of the Federal Government, January 22, 1833" Calhoun Papers: 18-26.

[197] John C. Calhoun, "Speech on the Revenue Collection [Force] Bill," Union and Liberty: 401-460.

[198] "Speech Introducing Resolutions Declaratory of the Nature and Power of the Federal Government," Calhoun Papers, Volume XII: 25-26.

[199] Peterson, The Great Triumvirate: 222. Calhoun himself remarked that he introduced the resolutions "to test those principles, with a desire that they should be discussed and voted on before the [Force] bill came up for discussion." The majority ordered otherwise.

agree that the states had acceded to the Union as sovereign entities, his other arguments would fall into line and thus defend his position.

When the resolutions were not brought to the floor for a vote, and the Force Bill was introduced instead, Calhoun rose on 15 February to commence his two-day speech against the Jackson Administration and to defend his position on states-rights. The crux of the issue was, "Has this government a right to impose burdens on the capital and industry of one portion of the country, not with a view to revenue, but to benefit another?" And, if the general government does impose unequal burdens that go against the Constitution, in what manner can the States protect their reserved powers assured under the Tenth Amendment? Calhoun reiterated the principles of Nullification expressed in the *Exposition* and *Fort Hill Address.* Calhoun stressed that the act of nullifying a law applies *only to laws that are expressly against the Constitution.* Calhoun conceded that it would be folly to allow States to nullify any particular law that they do not approve. But, the States, retaining the ultimate sovereignty over their welfare, need to maintain their sovereignty against the encroachments of the General Government.

> This ascendancy can only be preserved through the action of the States as organized bodies, having their own separate governments, and possessed of the right, under the structure of our system, of judging of the extent of their separate powers, and of interposing their authority to arrest the unauthorized enactments of the General Government within their respective limits.[200]

Calhoun concluded his speech by asserting that if the South were to fail in its opposition, all Southerners would be forever excluded from the protections of the General Government, and the North would reign supreme in the Union.

After Calhoun's speech, Senator Daniel Webster rose and gave his rebuttal, which was similar in style and content to his famous speech against

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[200]John C. Calhoun, "Speech on the Revenue Collection [Force] Bill," Union and Liberty: 455.

Senator Robert Hayne on 26 January 1830. Webster's purpose was to reject the compact theory and to reiterate the revolutionary aspect of nullification, equating it with secession and the death of the union. Webster argued that the law of the Union was the supreme law of the land, not allowed to be judged by the States.[201] Webster maintained that the United States are one people, not people of various states that created the Union. Webster said that "Congress may judge of the true extent and just interpretation of the specific powers granted to it..."[202] Webster contended that the Constitution will not be overstepped by the General Government because the "Members of Congress are chosen by the people; like other public agents, they are bound by oath to support the constitution. These are the securities that they will not violate their duty, or transcend their powers."[203]

On 26 February 1833, Calhoun's *Resolutions on the Nature of the Federal Relations* were under consideration, and he used this as an opportunity to rebut Webster's speech ten days prior.[204] Calhoun's speech was an excellent display of the "forensic lashing" of which he was so capable. Calhoun used an earlier speech of Webster's (Webster's Reply to Hayne, 26 January 1830) against Webster. Calhoun noted that Webster had acknowledged that the Constitution was a compact, and that Webster's state of Massachusetts had used the same language in the ratification of the Constitution.

Calhoun used this foothold in Webster's own speech to contend that "we the people" were the citizens of the sovereign States who ratified the

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[201]"Webster's Speech on the Revenue Collection Bill, February 16, 1833," Gales and Seaton's Register of Debates in Congress (Washington: Gales & Seaton's, 1825-1837): 553-587.
[202]Ibid.: 573.
[203]Ibid.: 575.
[204]"Speech in Reply to Daniel Webster on the Force Bill, February 26, 1833," Calhoun Papers, Volume XII: 101-136.

Constitution, not the aggregate of the Union.[205] Calhoun asserted that the Constitution does not explicitly state that the Supreme Court is the ultimate arbitrator over the Constitution. It is the States, as parties to the compact, who are to be the ultimate judges, for are they not also part of the federal system? And since the Supreme Court is part of the General Government, and the Tenth Amendment protects the States from an encroachment by the General Government on their reserved powers, does it not follow that the Supreme Court does not have the proper authority to judge of encroachments against the States by the General Government? Here, Calhoun fell back on his core belief that government should be the rule of law and not the rule of man. Calhoun believed that power begets power, and that eventually, some officials will disregard their oath of office for the aggrandizement of power. Therefore, if there is not in place a system whereby the states have a clear mode of redress against violations of their rights, then ultimately, the General Government will slowly encroach on the rights of the States, eventually reducing them to mere administrative units. Calhoun concluded that

> the very fact that the States may interpose will produce moderation and justice. The General Government will abstain from the exercise of any power in which they may suppose three fourths of the States will not sustain them; while, on the other hand, the States will not interpose but on the conviction that they will be supported by one fourth of their co-States. Moderation and justice will produce confidence, attachment, and patriotism; and these, in turn, will offer most powerful barriers against the excesses of conflicts between the States and the General Government.[206]

One of the main misperceptions that Webster, as well as many others, had of Calhoun's doctrine of nullification, was that a State government could nullify

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[205]For a recent discussion of the states-rights issue as it pertains to the ratification of the Constitution, see Forrest McDonald, Novus Ordo Seclorum: The Intellectual Origins of the Constitution (Lawrence, KS: University Press of Kansas, 1985): 147-157, and 279-284.
[206]Ibid.: 133.

any law, thus abrogating that law for the entire Union. Calhoun always emphasized that nullification was an instrument to be used only if the General Government passed a law that was clearly unconstitutional; and then, only after a special State convention on the subject stated--majority permitting--the same. Calhoun also repeated that if that law was made constitutional via the amending process, the nullifying state was duty bound, having ratified the original compact, to adhere to the amended constitution. Calhoun was always consistent in his argument that whatever is in the sphere of the National Government, under the Constitution, the National Government is allowed to perform to its fullest capacities.[207]

Freehling makes several criticisms of Calhoun's logic that deserve comment; for they are the remarks usually expressed by Calhoun's detractors.[208] Freehling asserts that Calhoun would have destroyed the amending process as expressed in the Constitution because a single State could nullify a law. Calhoun, in his *Discourse*, and in several of his speeches, expressly declared that if the normal constitutional amending processes were followed, and the States amended the Constitution so as to make the offensive law constitutional, then the nullifier would have no choice but to acquiesce, "by the solemn obligation which it contracted, in ratifying the constitution."[209] In fact, Calhoun stated that :

> it is the duty of the federal government to invoke its aid (the amending process), should any dangerous derangement or disorder result from the mutual negative of the two co-ordinate governments, or from the interposition of a State, in its

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[207]For example, see Calhoun's defense of Congress' authority over the circulation of money, as described in Bray Hammond, Banks and Politics in America: From the Revolution to the Civil War (Princeton: Princeton University Press, 1957): 234-236, 367-368, and 427-429.

[208]Freehling, Prelude to Civil War: 159-173.

[209]John C. Calhoun, "A Discourse on the Constitution and Government of the United States of America," : 196-213; "Speech on the Revenue Collection [Force] Bill, February 15-16, 1833:" 458-459; and "Exposition and Protest:" 355-356 (all found in Union and Liberty). See also "Draft Report of Federal Relations, November 20, 1831," Calhoun Papers, XI: 491, "Letter to James Hamilton, Jr., August 28, 1832," Calhoun Papers, XII: 636-637, .

> sovereign character, to arrest one of its acts--in case all other remedies should fail to adjust the difficulty.[210]

In short Calhoun never argued that a single state had the power to alter the Constitution.

Freehling's second criticism asserts that the right of three-quarters of the states to amend the Constitution forced the States to relinquish part of their sovereignty; for the dissenting States in the amendment process must obey the constitutional amendment, as parties to the compact. Calhoun would answer that the Union had already tried to make legislation via unanimous consent in the Articles of Confederation, and as a result, the Union came close to anarchy before the Founding Fathers intervened with the creation of the Constitution. Therefore, in order to prevent a recurrence of the same situation, the sovereign States *delegated* their authority in the Constitution, of certain enumerated powers, to be used by the National Government.[211]

The last criticism on Calhoun's logic, Freehling states, is that Calhoun destroys the Lockean social-contract theory. This destruction is caused when Calhoun gives to the portion of the community (defined as the States) the power to judge and annul laws that the governed had consented to in the original compact (defined as the Constitution), thus returning society to a state of anarchy. Calhoun's rebuttal would state that the inherent right of self-defense in a sovereign state would allow that state to abrogate laws that are expressly contrary to the original contract that the parties assented to in the first place. The decision of the government to create laws contrary to the original compact and to the well-being of the state was, for Calhoun, a state of anarchy in itself.

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[210]Ibid.: 208-209.
[211]"Speech on the Revenue Collection [Force] Bill:" 433-435.

Although the South Carolinians did not follow the letter of their Nullification Ordinance, the effect they desired was, for the most part, achieved. The legality of their actions is still being debated today. Yet the actions of Calhoun in the Nullification Crisis were quite similar to those of the abolitionists a decade later in the passage of Personal-Liberty Laws that were in conflict with to the Federal Fugitive Slave Laws.

Although the Nullification Crisis is the most recognizable incident of the use of nullification or interposition in American politics, there were other notable incidents in which a State or States objected to the execution of a federal law. As stated above, one prominent example was the Northern use of personal-liberty laws, which in effect annulled the Federal Fugitive Slave Laws. The personal-liberty laws came about as a result of *Prigg v. Pennsylvania (1842)*, a case in which the U.S. Supreme Court decided that the States did not have the "right to legislate on the subject of fugitive slaves at all."[212]

One of the first challenges, in which a state effectively nullified the Supreme Court ruling, was the Latimer case of 1842.[213] This case illustrated that the state of Massachusetts did not cooperate with the federal authorities in the capture and return of a fugitive slave. "In effect, in this first duel, the Fugitive Law had been publicly flouted."[214] To the Northerners, and the abolitionists in particular, the Constitution guaranteed to all the promise to "promote the general Welfare, and secure the blessings of liberty to ourselves and our Posterity..." Therefore, according to the logic of the abolitionists, since the Fugitive Slave Laws went against the intent of the Constitution, the State had a

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[212]Louis B. Heller, The Crusade Against Slavery (New York: Harper & Brothers, Publishers, 1960): 170. Heller adds that the Southerners as well as the Northerners saw this ruling as a dangerous encroachment on their State sovereignty.
[213]Ibid.: 171.
[214]Ibid.

right to ensure that the National Government did not attempt to impose an unconstitutional law upon its citizens. And, according to the logic put forth by Calhoun, since the States or National Government did not attempt to amend the Constitution to explicitly state otherwise, the Fugitive Laws were indeed unconstitutional.[215]

For Calhoun, nullification was the tool with which States could protect themselves from the encroachments of the National Government. But Calhoun wanted to create a theoretical system of government that ensured an adequate protection, and a reliable mode of representation, for all parties involved. The system that Calhoun was building up to was the theory of concurrent majority.

C. DISQUISITION ON GOVERNMENT AND THE THEORY OF CONCURRENT MAJORITY

John Calhoun's theory of concurrent majority was first formally outlined in his *Disquisition on Government*.[216] The concurrent majority, as opposed to an absolute majority, presupposes the sovereignty of the state in a federative compact. The concurrent majority "considers the community as made up of different and conflicting interests, as far as the action of the government is concerned; and takes the sense of each, through its majority or appropriate organ, and the united sense of all, as the sense of the entire community."[217] Calhoun gives several historical examples of political units with an operating concurrent majority; these examples are the Republic of Poland-Lithuania (1569-1795), the Roman Republic (250-50 B.C.), the Iroquois Confederacy of Six Nations

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[215]Calhoun, it could be hypothesized, would be against this application of his logic, even though it conforms to his reasoning on the principle of Nullification.

[216]John C. Calhoun, "Disquisition on Government" in Ross M. Lence, ed., Union and Liberty: The Political Philosophy of John C. Calhoun (Indianapolis, IN: Liberty Fund, 1992): 3-78. Calhoun's *Disquisition* was first published in 1851, one year after his death.

[217]John C. Calhoun, "Disquisition on Government": 23-24

(circa 1500-1787), and the English Constitution (circa 1688). In each of the examples, Calhoun stresses, there existed, for all interests, a guaranteed right of self-protection with a "negative power--the power of preventing or arresting the action of government--be it called by what it may--veto, interposition, check, or balance of power--which, in fact, forms the constitution."[218] It is this protection of states entering into a compact, Calhoun argues, that allows them to operate effectively. For without the adequate protection of the sovereignty of states, the absolute majority of the whole would lead to an absolute government, without any regard for the rights of States in a minority.[219]

Calhoun states that the first step in the making of the concurrent majority is to create a constitution. For, as Calhoun stresses, since man is a social creature, he will always come together with his fellow man in social compacts and form governments. But it is the advanced civilization that has the maturity and virtuousness necessary to form a constitution delineating clear roles for the government.[220] One of the first steps in the constitutional process is the right of suffrage (for Calhoun, it is the "foundation of a constitutional government").[221] Though the right of suffrage is the keystone, it is also a potential millstone to be tied around the neck of the people. The reason is what Calhoun calls the dangers of the absolute majority. According to Calhoun,

> a struggle will take place between the various interests to obtain a majority, in order to control the government. If no one interest be strong enough, of itself, to obtain it, a combination will be formed between those whose interests are most alike...until a sufficient number is obtained to make a majority....When once

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[218]Ibid.: 28.
[219]Ibid.: 29.
[220]Ibid.: 9-10. Calhoun stated that "constitution stands to government as government stands to society." By this he meant that the constitution of a people is the highest attainment of government that they can reach.
[221]Ibid.: 13.

> formed, the community will be divided into two great parties--a major and minor-- between which there will be incessant struggles...[222]

The faithful supporters of the dominant party will benefit from a vast system of patronage. Then, Calhoun states, politicians will show loyalty, not to the country and Constitution that they were sworn to uphold and protect, but to the party which brought them into office.[223] This would continue until the party in power, by using the principle of absolute majority, would pass enough laws to solidify its position of power until there would be left only two alternatives: despotism or revolution.[224]

How then, Calhoun asks, can the minority be protected from the potential abuses of the majority? It is "by taking the sense of each interest or portion of the community, which may be unequally and injuriously affected by the action of the government, separately, through its own majority, or in some other way by which its voice may be fairly expressed; and to the consent of each interest, either to put or to keep the government in action."[225] The "interest or portion" that Calhoun is alluding to consists of the separate states.[226]

As stated before, Calhoun, in his *Disquisition on Government*, gives four examples of the concurrent majority in operation: the First Polish Republic, the

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[222]Ibid.: 15-16.

[223]Ibid.: 33. Calhoun adds that "principles and policy would lose all influence in the elections; and cunning, falsehood, deception, slander, fraud and gross appeals to the appetites of the lowest and most worthless portions of the community, would take the place of sound reason and wise debate."

[224]Ibid.: 33-37. Bertrand de Jouvenel's On Power: The Natural Growth and its History (Indianapolis, IN: Liberty Fund, 1993 [originally published in 1945]) gives an excellent analysis of on the dangers of the absolute majority. See also Alexis de Tocqueville, Democracy in America, Volume I (New York: Vintage Books, 1991 [originally published in English in 1835]) for his perceptions of the American potential for the "tyranny of the majority."

[225]Ibid.: 21.

[226]"Letter to James Hamilton Jr., (Governor of S.C.) August 28, 1832." Calhoun's letter to Governor Hamilton is the first instance of his theory of concurrent majority being postulated on paper.

Confederacy of Six Nations, the Roman Republic, and the English Constitution. The records of each of these governments deserve to be summarized as Calhoun described them, and then to be analyzed from independent sources.

Poland, according to Calhoun, furnishes the most extreme instance of a concurrent majority.[227] The government required the acquiescence of every noble present, which numbered from 150,000 to 200,000, to elect the king. The Diet consisted of "the king, the senate, bishops and deputies of nobility...of the palatinates" in which all "possessed a veto necessary to enact a law or to adopt any measure whatever." This in effect made every nobleman a majority interest in the government. Calhoun contends that the amazing aspect of the Polish government was its ability to defeat the Moslems when they twice invaded Europe. The downfall was not due to Poland's military vulnerability to external threats, but due to the intrigues of her neighbors, which caused her to crumble from within.[228]

The Confederacy of Six Nations is Calhoun's next example. The Confederacy had six separate nations with seven delegates from each nation in the council. Each member of the council had a veto on all decisions, similar to the Polish system. Calhoun states that the Confederacy, under this system of government, became the most powerful of the Indian tribes in the borders of the United States.[229]

The Roman Republic had its birth when the plebeians (the lower class) threw off the yoke of oppression and essentially forced the patricians (the nobles) to accept the election, by the plebeians, of two tribunes (increased later to ten), to

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[227] A Disquisition on Government: 53.
[228] Ibid.: 53-54.
[229] Ibid.: 54.

protect their interests.[230] This action by the plebeians enabled them to secure a veto on the actions of the patricians in the Senate. This republican form of government continued for centuries, states Calhoun, because the two classes, with their mutual vigilance to prevent potential abuses, were able to harmonize their interests. The Roman Republic's downfall came when the patricians used the acquired wealth of plunder to "corrupt and debase" the plebeians, a situation that the constitution was not capable of dealing with.[231]

The constitution of Great Britain was the result of a process commencing with the Norman Conquest of 1066. After "many vicissitudes" and a long struggle, the "feudal monarchy was converted...into a highly refined constitutional monarchy, without changing the basis of the original government."[232] This constitutional monarchy is divided into three main branches or "estates": the king, the House of Lords and the House of Commons. Laws are enacted with the concurrence of both chambers of Parliament and the approval of the king. The main tension in the realm is between the House of Commons and the monarchy, with the House of Lords acting as the buffer.[233] The reason the Lords are the buffer, states Calhoun, is that the Lords are the recipients of the "honors and emoluments" from the crown, and ascendancy of either the House of Commons or the Crown would be a detriment to the power of the House of Lords. Thus, the House of Lords is "opposed to the ascendancy of either--and in favor of preserving the equilibrium between them."[234]

These four examples of the concurrent majority are quite distinct. The Polish example illustrated the concurrent majority in a pure, pluralistic and

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[230]Ibid.: 69-71.
[231]Ibid.
[232]Ibid.: 71-78.
[233]Ibid.: 75.
[234]Ibid.

libertarian democracy (although the suffrage was only extended to the aristocracy). The Confederacy of Six Nations illustrated a representative federal republic; the Roman Republic exemplified the concurrent majority quelling intense class differences that threatened to rip asunder the entire government; and the English constitutional monarchy, while similar to the Roman example in the class differences, operated with a bicameral legislative method which could only enact laws with the concurrence of all three branches. The validity of Calhoun's examples must be assessed.

1. Analysis of Calhoun's Examples

a. The First Polish Republic

The first example, and indeed the most extreme, of the concurrent majority governments is the First Polish Republic, or the Republic of Poland-Lithuania in 1569-1795. Although Calhoun does not explicitly state that this was a concurrent majority government, he does mention the use of the 'liberum veto,' which was only used in the Republic of Poland-Lithuania. The main reason that this, out of all the examples that Calhoun gives, is the most extreme, is that the concurrent majority was, in reality, a concurrent unanimity. This principle was not only used in the main legislative body, the Sejm, but also in the electoral process for choosing a new king. Although the right of suffrage only extended to land-holding nobles, this still led to a situation where tens of thousands of nobles assembled in a field to choose, by unanimous consent, a king. Needless to say, the situation was chaotic at best.[235] After election, the king had to accede to the conditions "on which they [the nobles] would agree to his coronation."[236] One of

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[235]Norman Davies, God's Playground: A History of Poland, Volume I, The Origins to 1795 (New York: Columbia University Press, 1982): 332-334. Davies makes the point by stating that in 1764, when "only thirteen electors were killed , it was said the Election was unusually quiet."
[236]Ibid.: 334

the most radical rights of the nobles was the "right of resistance, indeed their duty to disobey the king if he contravened his oath."[237] Even though the king seemed to be a hostage of the nobles, he exercised considerable latitude over the proceedings of the Sejm.

In the Sejm, as well as in the dietines (the assemblies in each of the separate provinces of the kingdom), the principle of unanimity also held.

> No proposal could become law, and no decision was binding, unless it received the full assent of all those persons who were competent to consider it. A single voice of dissent was equivalent to total rejection. Majority voting was consciously rejected. There was to be unanimity or nothing;...[238]

The reason for this type of voting procedure seems to have been twofold. First, law enforcement in the Republic was non-existent and left up to the individual.[239] Therefore, in order for the nobles to obey the law, they would all have to consent to it in the first place. Secondly, the nobles in the Sejm felt that the threat of complete chaos if the legislative agenda was not agreed to was impetus enough to force compromises on the issues. In the Sejm, the method of dissent was known as the 'liberum veto,' in which a single noble could voice dissent on an issue and completely stop the entire proceedings until the cause of dissent was rectified by the dissenter and the Marshal of the Sejm.[240] It might seem to an outside observer that gridlock would be a perpetual occurrence, yet this procedure operated without great difficulty until 1652, when a 'liberum veto' was used; but the dissenter then left and could not be found. The Marshall of the Sejm, holding to strict constitutionality, declared the veto valid, and thus all legislation for that year was declared null and void.[241] Once Poland's enemies

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[237]Ibid.
[238]Ibid.: 338-339.
[239]ibid.: 348-349.
[240]Ibid.: 345.
[241]Ibid.: 346.

realized the potential for disruption they could cause, bribery became rampant in the Sejm in order to stall the government. This was insidious for Poland, for no decision concerning the state could occur without the full consent of the entire Sejm.

b. The Confederacy of Six Nations

Calhoun's next example of the working concurrent majority was the Confederacy of Six Nations. The Confederacy was first founded around 1500 using an unwritten constitution (similar to that of the British).[242] Although the Iroquois philosophy of private property was radically different from Calhoun's,[243] their decision-making process was almost a mirror-image of the system of concurrent majority. In the legislative process, consensus had to be reached between the Cayugas and the Oneidas, followed then by the Senecas and Mohawks,[244] The next stage in the policy-making process went to the Onondagas, who acted as a judicial reviewing body to decide the constitutionality of the legislation. If the legislation was deemed to be injurious to the peoples of the Confederacy, and inconsistent with the Great Law of Peace, the legislation process began again, in order to amend the offending piece of legislation.[245] Once the Onondagas reached consensus on constitutionality, the legislation was taken to the chief presiding over the debates, who confirmed it by

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[242]Wayne Moquin, "Constitution of the Iroquois Federation, Degandawida (Mohawk)," Great Documents in American Indian History (New York: Preager, 1973): 20. The Confederacy was originally comprised of the Mohawk, Oneida, Onondaga, Cayuga and the Seneca; with the Tuscarora joining later.

[243]"Iroquois Political Theory," in Oren Lyons, John Mohawk, Vine Deloria, Lawrence Hauptman, Howard Berman, and Donald Grinde, *et al.*, eds., Exiled in the Land of the Free: Democracy, Indian Nations and the United States Constitution (Santa Fe, NM: Clear Light Publications, 1992): 233.

[244]Ibid.: 238.

[245]Ibid.

way of unanimous consent, whereupon the legislation was announced to all the tribes.[246]

If the peoples of the different tribes thought the constitution needed revising, or the laws needed to be changed, they could, according to the Great Law of Peace, "propose their own laws even when the leaders fail to do so." The system of checks and balances set up by the Confederation was "strictly adhered to."[247] For example:

> the hereditary peace chiefs were interested only in external matters like war, peace, and treaty-making; the Grand Council could not interfere with the internal affairs of the tribe; and each tribe had its own *sachems* (chiefs), although they were limited in that they could only deal with their tribe's relations with other tribes, and had no say in matters that were traditionally the concern of the clan.[248]

c. The Roman Republic

The Roman Republic, Calhoun's third example, was divided into two main parts, the Assembly and the Senate. The Assembly, according to historians, was the only body that "could pass laws; they alone elected annual magistrates; in the earlier part of the period, they even heard major trials and made policy decisions about Rome's relations with foreign powers."[249] In theory and in fact (at least in the early part of the Republic), the Senate was granted the power to write laws, but the Assembly was the only body that could enact the laws. This made the Republic resemble Calhoun's concurrent majority in that there were interests (the Senate and the Assembly) that had a check on each other. The Assembly members could not create laws on their own recognizance, for if they had the power to do so, they would undoubtedly have attempted to

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[246]Ibid.: 239.
[247]Ibid.: 240.
[248]Ibid.
[249]J.A. North, "Democratic Politics in Republican Rome," Past & Present 126 (February 1990): 3.

legislate laws in their favor. And if the Senators had the power to pass laws they introduced, likewise, they would have done so to consolidate their power within the system.

In the Assemblies, the voting was not done according to individual head count, but by a count of fixed groups within the Assembly itself.[250] This, it seems, reflects the essence of Calhoun's concurrent majority in that consensus was reached by taking a sense of the different groups within the system. The Roman Republic operated efficiently in this manner from approximately 250 BC to 100 BC. The system of checks and balances in the Senate and Assembly apparently began to erode in the first century BC when it became commonplace for the Roman nobles to bribe the assemblies to get the necessary votes to pass legislation. The nobles, in fact, "more than any other social élite in history, were dependent on popular elections for the very definition of their relative status in society, [and] were willing to pay a high price for the vote of the urban plebs."[251] The nobles, in effect, had to bribe the assemblies in order to get re-elected back into office. Once this behavior became prevalent, the assemblies lost their effective check on the nobles, and the Republic began its rapid decline into Empire.

d. The English Constitution in the Classical Age

"Nowhere in the [English] constitution did there exist an arbitrary power, capable of imposing its commands on the subjects, carrying them out by

[250]Ibid.: 5. North states that the Assemblies were voting meetings. The Romans had different assemblies for different purposes, probably similar to the committee structure in the U.S. Congress. The system of group-voting led to a hierarchy in the assemblage in which the dominant families, in wealth and prestige, came to exercise a great amount of control over the voting blocks. It seems that the voting groups were, in the modern sense, interest groups.

[251]Alexander Yakobson, "*Petitio Et Largitio:* Popular Participation in the Centuriate Assembly of the Late Republic," Journal of Roman Studies 82, (Annual 1992): 50. Yakobson states that many of the Roman nobles in the Senate and the Magistrate had, in the course of their political careers, incurred enormous debts in order to stay in office.

its own executive action, subjecting their meaning and effect to its own jurisdiction."[252] This was the system of the British government before the independence of the Colonies that became the United States, and the system Calhoun refers to. The Parliament did indeed have the legislative supremacy, but the power of the executive and the administration of law lay with the Crown and his (or her) Cabinet. The judicial system was a "duality between Chancery and Common Law courts," yet, the Judges, through the Act of Settlement, were independent of both branches.[253]

Although the supremacy of Parliament was much greater than that of the United States Congress, the Parliament did indeed operate under the system of checks and balances between the Monarch, the House of Lords, and the House of Commons.[254] The King's system of patronage was considered an effective means of checking any encroachments by the Parliament, for it was the members of Parliament who were the beneficiaries of the "emoluments." This system worked well when the internal affairs of the nation were running without difficulty. Once a political problem arose which caused dissent and distrust, the system began to break down.[255] It is interesting to note in view of Calhoun's concern in this regard, that minority representation was lacking in the British example; the absence of such representation prevented the thirteen colonies from obtaining proper redress in Parliament, thus leading to the War of Independence.

Calhoun's description of the four examples matches closely with historical analyses performed 150 years later. Of these four, the Confederacy of

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[252]Sir David Lindsay Keir, The Constitutional History of Modern Britain: Since 1485 (London: Adams and Charles Black, 1961): 294. This period, 1714-1782, is referred to as the "Classical Age of the Constitution."
[253]Ibid. Sir David does point out that the judges could be removed from office with the concurrence of both Chambers of Parliament.
[254]Ibid.: 295.
[255]Ibid.: 297-299.

Six Nations seems to offer the best overall example of the concurrent majority. It alone contains all of the principles of concurrent majority that Calhoun lays out in his *Disquisition.* For example, all of the tribal nations had an effective check on each other in the Great Council, there was a judicial review that strictly adhered to the constitution, and there was a clearly delineated separation of powers, not only in the central government (the Great Council) but in the individual nations as well.

D. CALHOUN'S ANALYSIS OF THE JUDICIARY

Calhoun's *A Discourse on the Constitution and Government of the United States* was the sequel to the *Disquisition.* In the *Discourse,* Calhoun uses the theory of concurrent majority to explain the governmental process of the United States. Calhoun's admiration of the Constitution is apparent, especially in the area of the Judiciary. Calhoun contends that the check that the Judiciary possesses on the rest of the government, along with its complete independence of the other two branches (given unimpeachable behavior), gives a "weight and dignity to the judicial department never before possessed by the judges in any other government of which we have any certain knowledge."[256] The contention that Calhoun introduces is that the National Government, as with any political body, will always attempt to aggrandize its power at the expense of others. Since the three departments--the Executive, the Legislative and the Judiciary--have sufficient checks on each other, Calhoun is not that concerned about a potential take-over of the National Government by one of its concomitant branches. But, the States, which only have the Tenth Amendment as a shield, are more vulnerable. The Supremacy Clause of the Constitution,[257] Calhoun contends, is

[256]John C. Calhoun, "A Discourse on the Constitution and Government of the United States," Liberty and Union: 157.
[257]U.S. Constitution: Article III, Section 2.

the clause that the National Government uses to construct the limits of its own authority; it then uses that authority to usurp the proper authority of the States.[258]

Calhoun's rebuttal to the National Government's Supremacy Clause argument is two-fold. First, there is nothing in the Constitution which expressly declares the Supreme Court's right to enforce its decisions over the laws of the several States.[259] Also, there does not exist in the Constitution any passage that provides that either the U.S. Supreme Court or State Supreme Courts can be made defendants against each other. If there does not exist any such language, Calhoun argues, then the Constitution must be construed by the National Government, so as to allow it the authority to assume the supremacy. This interpretation allows the Supreme Court to claim ultimate jurisdiction over the Constitution. But, Calhoun argues, this ultimate arbitration belongs to the character of a national government, not a federal government.[260]

In a true federal government, Calhoun maintains, the right of deciding the constitutionality of a law belongs to both of the "co-ordinate" governments: the State and National Governments. Therefore, "where two governments differ as to the extent of their respective powers, a mutual negative is in the consequence."[261] Although Calhoun agrees that such a system would lead to conflict between the two spheres, he maintains that the potential evil of absolute government, a government that can exercise despotic control over the States, is by far the greater evil to contend with. Calhoun also reasons that the accusation

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[258]John C. Calhoun, "A Discourse on the Constitution and Government of the United States," Liberty and Union: 182.
[259]Ibid.: 183.
[260]Ibid.: 187.
[261]Ibid.: 188

that State Courts always lean in favor of the State is another weak defense of the implied supremacy of the Supreme Court:

> But if the State courts should have a strong leaning in favor of the powers of their respective States, what reason can be assigned, why the Supreme Court of the United States should not have a leaning, equally strong, in favor of the federal government?[262]

For Calhoun, the remedy for a collision between the two spheres involves the amending process. For example, suppose a State Supreme Court declared unconstitutional the right of the National Government to pass legislation requiring the confiscation of all private property. The National Government then has several options; it can repeal the law or enforce the law. To enforce the law, the National Government must make the law appear constitutional; to do this, the federal courts, or even the Supreme Court, may rule that the law is in fact constitutional, and require the State to comply with the federal law.

The State then has two courses. The State can either acquiesce, or, via a State convention on the subject, nullify the offending law. If the National Government still deems the law to be constitutional, then with a two-thirds majority in both chambers of Congress, it can request a constitutional amendment stating that ownership of private property is illegal; it can seek then the concurrence of three-quarters of the States. If three-quarters of the States agree with the National Government, then the proposed amendment becomes part of the Constitution, binding on all the States. The objecting State that sought nullification of the law then has no other recourse but to submit. But, if enough

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[262]Ibid.: 230. Calhoun asks a series of penetrating as to why the Supreme Court is supposedly such a sagacious institution, and the State Supreme Courts are not given the same accordance.

other States agree with the original State, preventing approval of a constitutional amendment, then the National Government must repeal the law.[263]

E. CONCLUSION

John C. Calhoun's theory of concurrent majority remains one of the most original and cogent theories of minority representation in a democratic government. The theory does not pretend to allow for an efficient government that is immediately responsive to all public needs.[264] Instead, Calhoun viewed government as a protector of life, liberty, and property. Calhoun was a spiritual heir to the Old Republicans in supporting the axiom that only power can effectively check power. If one starts to rely on the restraint and virtue of others for safety, one may quickly find oneself in peril.

From Patrick Henry and "Brutus,"[265] to John Taylor[266] and John Randolph, Calhoun argued within the context of a rich tradition of states-rights advocacy. That his theory was attached to the defense of one of the most

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[263]Another excellent commentary on the Supreme Court from the same period can be found in John Taylor, Tyranny Unmasked: 193-268. Taylor states, concerning Judicial review and original intent: "It is found in no writer; it has never been a component part of any government; and it is highly probable when the constitution was made, that not a single person in the United States contemplated the idea, of its having empowered the Federal Supreme Court to divide political powers between the Federal and State governments, just as it does money between plaintiff and defendant." (p. 203)

[264]Russell Kirk stated : "He slides quickly over formidable objections, he evades any very precise description of how the principle may be applied." Yet in spite of these flaws, Kirk added, Calhoun described "a philosophical principle, and it is one of the most sagacious and vigorous suggestions ever advanced by American conservatism." The Conservative Mind: 181.

[265]"This government is to possess absolute and uncontroulable [*sic*] power, legislative, executive and judicial, with respect to every object to which it extends...It appears from these articles that there is no need of any intervention of the state governments, between the Congress and the people, to execute any one power vested in the general government, and that the constitution and laws of every state are nullified and declared void, so far as they are or shall be inconsistent with this constitution..." "The Letters of Brutus:" 667-668.

[266]"Good theories for the preservation of liberty are most liable to be destroyed by piecemeal; bad ones, by a single blow: and therefore as ours is exposed to most danger from the detail mode of destruction, it is more important to the States to possess the right of self-preservation against the insidious enemy, than against one which dares not even show his face." John Taylor, Tyranny Unmasked: 204-205.

pernicious and abominable of all practices (slavery) led many of his peers in the North, as well as historians and Americans of all walks of life, to reject Calhoun's theory outright. The tendency to place the victors in the right and the vanquished in the wrong has prevented many from undertaking a serious consideration of the theoretical basis of what Calhoun defended in the arena of states-rights and state sovereignty. Calhoun's theories on representative government are not by any means the cure-all for political ailments. It is doubtful if there will ever be such a thing as a perfect model of government; the very nature of human behavior dictates otherwise. But John C. Calhoun's theory of concurrent majority merits a closer examination by those who wish to preserve, to some extent at least, the sovereignty of states pursuing a form of political integration.

A.V. Dicey, in *Introduction to the Study of the Law of the Constitution,* points out that the goal of a federal body is to "reconcile national unity and power with the maintenance of 'state rights'."[267] Calhoun was a fervent believer in the Federal Republic. Yet he had the same opinion of man and government that many of the Founding Fathers possessed: to quote Lord Acton's famous maxim, "Power tends to corrupt, and absolute power corrupts absolutely." Calhoun held no illusion that the oath of office was a sufficient barrier to prevent the usurpation of power. In this regard, Calhoun stood in the same tradition as Federalists John Adams and Fisher Ames, as well as the anti-Federalist Patrick Henry. Calhoun recognized the inherent danger in the "tyranny of the majority" well before Alexis de Tocqueville's *Democracy in America* reached American shores.

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[267] A.V. Dicey Introduction to the Study of the Law of the Constitution, (Indianapolis: Liberty Fund, 1982). The first edition was published in 1885. As a writer in the Lockean tradition, Dicey refers to the constitution as a contract or compact.

Throughout the *Disquisition*, the *Discourse*, the speeches and the letters, Calhoun maintained that the only effective means to check power was through another agent of power. This did not mean the total hegemony of States over the National Government. Calhoun realized that such an arrangement would lead to the same crisis that befell the Republic with the Articles of Confederation. But also, Calhoun believed that the Supreme Court as the ultimate judge over the constitutionality of the legislature's actions and the ultimate arbitrator of the Constitution was not enough. In the last decade of his life, Calhoun witnessed an ever-growing predominance of the North over the South. To Calhoun, this meant that the Congress would be able to pass any legislation favoring the northern interests with impunity. Calhoun also realized that since the Senate approved Supreme Court Justices, and a Northern majority would always be able to choose the President, who would nominate the Justices, the Supreme Court would eventually be filled with jurists from the North, favoring the Northern perspective.

With such a future scenario in mind, Calhoun became increasingly pessimistic regarding a National Government staying within its bounds. Since sovereignty was, for Calhoun, indivisible,[268] he maintained that the States had the final judgment over its fate. The Supreme Court did have a proper and essential role in the checks and balances, but within the National Government. Recent scholarship on the subject seems to confirm that Calhoun's foreboding about creeping centralization was well founded.[269] Calhoun believed that the

[268]Calhoun's predecessor, John Randolph of Roanoke, stated that "asking one of the states to surrender part of its sovereignty is like to asking a lady to surrender part of her chastity." See Russell Kirk, John Randolph of Roanoke: 88-89.

[269]George A. Bermann, "Taking Subsidiarity Seriously: Federalism in the European Community and the United States," Columbia Law Review 94, no. 2 (March 1994): 447; "A strong body of opinion would continue to deny the Tenth Amendment judicial sanction altogether, on the theory that, by its composition and its procedures, Congress naturally protects the states anyway, and

states should not have to rely on the benevolence of the National Government to secure their liberty. On the other hand, a constitutional scholar, Raoul Berger, posits that the States indeed have, through their own Supreme Courts, had a real right to abrogate federal laws not made in pursuance of the Constitution.[270]

To return to the original question at hand: does Calhoun's theory of the concurrent majority, and its concomitant tool, nullification, have any relevance to today's political circumstances in Europe? The framework laid out by Calhoun in his *Disquisition on Government*, as well as in his political actions and statements in the "Patrick Henry/Onslow Debates" and the Nullification Crisis match fairly well with certain aspects of the European Union in its past and present. The unanimity historically required for all the most important decision making in the European Coal and Steel Community, the European Economic Community and the European Community concur with Calhoun's premise. Seeing the nation-state as the final decision-maker also agrees with Calhoun's theory in that the member of that compact is the repository of sovereignty. The negotiations regarding the Single European Act and the Maastricht Treaty are consistent with Calhoun's logic of interests (the individual members of the EU) having a check on each other.

The nation-state is still the most important actor in the integrative process of the EU. Indeed, national identity in certain EU members (e.g., France and

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that if it does not, the states have only themselves to blame." Bermann also states that "neither the text of the Constitution nor the [Supreme] Court's federalism jurisprudence offers very strong legal guarantees that a proper political balance between the federal government and the states will be maintained...The Supreme Court's decision in *Garcia* --namely, that the legislative process itself may and must be relied upon to safeguard the basic autonomy of the states--remains essentially intact." (p. 423).

[270]Raoul Berger, Congress v. The Supreme Court (Cambridge: Harvard University Press, 1969): 258. Berger adds that the right of the States to judge unconstitutional an act of Congress comes from the Founders' reliance "on the inherent State court jurisdiction and the Article III appellate jurisdiction of the Supreme Court" (p. 278).

Britain) will for the foreseeable future remain an important factor in national decision-making processes. Members with strong national identities will strive to the utmost to ensure that they maintain an effective check (especially in the Council of Ministers) on the encroachment of their sovereignty by the European Commission and the European Parliament.

What needs to be accomplished now is to formalize the protection of the members in an EU constitution. This would accomplish two things. First, a written constitution would remove any ambiguity as to the proper roles of each organ within the EU framework (the member-states, the Commission, the European Parliament, the European Court of Justice, and the Council of Ministers). Secondly, it would give the smaller members an equal protection that the larger members currently enjoy due to their size and economic and political influence. As the two prior chapters have demonstrated, the non-accountability of the central government in regard to its members will always enable the central government to abuse its authority if it chooses to do so. A constitution based on concurrent majority principles might be able to hold the central government in check and to prevent any one member from holding hostage the decision-making process of the EU.

V. CONCLUSION

Indeed, a constitutional provision giving to the great and separate interests of the community the right of self-protection, must appear, to those who will duly reflect on the subject, not less essential to the preservation of liberty than the right of suffrage itself...that those who make and execute the laws should be accountable to those on whom the laws in reality operate--the only solid and durable foundation of liberty.[271] *(John C. Calhoun)*

A. KEY FINDINGS

This thesis concludes that no theoretical construct is without anomalies and shortcomings. No theory can fully capture the complex realities-- including the inherent unpredictableness of political choices--that will shape the unfolding events. The thesis may, however, succeed in identifying some broad trends and probabilities, in specifying the inadequacies of certain theoretical approaches, and in suggesting possible qualifications to some of the leading theories about political integration. The standard of evaluation used in this analysis is whether the theoretical approach is likely to protect effectively the sovereignty of the member states, and hence to win enduring popular support for the EU.

Thus far, this thesis has demonstrated that the first three theories of integration--functionalism, neofunctionalism and federalism--do not provide an adequate model of the EU as it now exists, nor do they furnish a firm basis for ensuring the future cohesiveness of the EU. On the other hand, the theory of concurrent majority reflects some key features of the EU, and offers a foundation for assessing the future cohesiveness of the political structure. The thesis recommends that a clearly written constitution be drawn up at the 1996 EU Intergovernmental Conference to be ratified by the citizens of the member states, if they wish to ensure protection for national sovereignty.

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[271] John C. Calhoun, "The Fort Hill Address," Union and Liberty: 372.

1. Functionalism and Neofunctionalism

The thesis finds the theories of functionalism and neofunctionalism to be lacking for several reasons: the inaccuracy of the theories as a model of the EU, and the unsatisfactory consequences of the two theories in the context of democratic traditions.

a. Inaccuracy of the Model

Functionalism predicts that the community-level organization providing social welfare for the citizen will erode the sovereignty of the nation-state. The theory also predicts that for every functional problem that arises, a functional organization will come into existence to solve that problem and then fade away when the problem is solved. The examples that Mitrany uses are not, however, substantiated by independent analysis. The same problem is evident with the theory of neofunctionalism.

b. Logical Consequences of Functionalism and Neofunctionalism

A major problem with the above two theories is their reliance on community-level or supra-national organizations that hold no accountability to the states or to the people. The functionalists contend that the constitutional practices of representative democracies interfere with the processes of functionalism. The neofunctionalists assert that decision-making responsibilities should be held by the elites in a supranational organization. Both theories maintain that the job of running society should be left to experts, engineers and technocrats; and that if the social welfare needs of the people are met, they will follow.

2. Federalism

The theory of federalism also displays shortcomings which make it an unsatisfactory basis for ensuring the future cohesiveness of the EU. The first

problem noted with federalism is that sovereignty tends to be gradually transferred from the states to the central government. The second problem is that the process of judicial review by the central court (in the U.S. case, the Supreme Court) historically has tended to rule in favor of the central government, thus stripping away authority from the states.

a. Sovereignty

When the sovereignty of the states is transferred increasingly to the central authority, the mode of redress of the state is greatly limited. For example, if the central government attempts to pass legislation which the state judges directly contrary to the well-being of its citizens, the state does not possess the proper authority to counter-act the central authorities. Another problem is that the state is represented in the House of Representatives by its proportion of the aggregate population of the federation, not as a state.[272] Therefore, if the state has a smaller population, it will tend to have less influence in the decision-making process of the House of Representatives due to the rule of the majority.

b. Judicial Review

The creeping jurisdiction of the central courts has also been perceived by some analysts as a problem for the federal theory of integration. In the United States, as well as in the EU, precedents have been set that erode or even clearly take away the power of the state to gain redress on important matters. (These precedents are discussed in a later section of this chapter). Once the precedent is made, it is difficult to reverse. Often the states have no effective means to prevent further encroachment by the central government.

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[272]In the U.S. Senate, of course, every state--no matter how small--has two Senators.

3. Theory of Concurrent Majority

The thesis has determined that John C. Calhoun's theory of concurrent majority provides a better model for assessing the future cohesiveness of the EU. Calhoun's theory is consistent with the early framework of the European Economic Community decision-making process (e.g., the "Luxembourg Compromise"), as well as the Maastricht Treaty negotiations. The theory of concurrent majority contends that the states will retain their sovereignty upon entering into the compact. Also, the states will retain the capability to prevent an encroachment by the central government on their own spheres of sovereignty and authority. The theory allows the compact to be amended to prevent stagnation and paralysis due to the objections of one or a few states.

B. A EUROPEAN CONSTITUTION BASED ON THE THEORY OF CONCURRENT MAJORITY

How can one fit the principles of concurrent majority theory to the European Union? Several aspects of the concurrent majority system are already in place. For example, on important decisions, the Council of Ministers has to pass laws by unanimous consent. But several key components of concurrent majority theory are missing from the European system and thus prevent it from becoming a concurrent majority government. This section examines the EU's key institutions (the Commission, the Council, the European Parliament and the European Court of Justice) and evaluates how they might fit into a constitution based on concurrent majority theory.

The EU members who brought the Maastricht Treaty into being should have held special ratification conventions or national referendums for the purpose of doing so. Denmark, Ireland, and France had national referendums on the matter, but some of the other nations ratified the treaty via their national

legislatures. If the governments wish to ensure popular support on an issue as important as the European Union, and gain the advantages found in the U.S. precedent, the process of ratification should be slow and deliberate. The process should not have to be an all or nothing affair in which the non-unanimity of all fifteen nations would prevent union. Rather, as in the United States Constitution ratification process requiring the ratification of nine states to bring into effect the Constitution,[273] three-quarters of the EU nations should be sufficient to bring together a more cohesive and integrated Union. And as other nations ratify the treaty within their own borders, they too would join the Union. This should be able to accomplish two criteria. The legitimacy of the Union to the people of the individual nations would be greatly increased. And the commitment of the individual nations to adhere to the laws of the Union would be strengthened.

1. The European Parliament, the Council of Ministers and the Commission

The European Parliament (EP) has long been regarded as the "democratic anchor" for an integrated Europe.[274] From its inception, the EP has been struggling to make itself a more influential body within the EU. The first instance of the EP gaining any power within the Union occurred in 1975, when it obtained co-decisional power in formulating the EU budget with the Council of Ministers.[275] The next step came in 1987 with the Single European Act (SEA), whereby the EP was granted the power to have two readings of legislation,

[273]The Constitution of the United States of America, Article 7

[274]See for example, Juliet Lodge, "The European Parliament and the Authority-Democracy Crises," The Annals of the American Academy of Political Scientists 531, (January 1994): 69-83; "European Parliament: The Democratic Dream," The Economist (21 May 1994) 21-24; and Andrew Duff, "Building a Parliamentary Europe," Government and Opposition 29, no. 2 (Spring 1994): 147-165.

[275]The EP, prior to 1975, had the power to dismiss, en masse, the Commission, but this was seen as a "nuclear weapon," something which could only be used as an ultimate weapon. See "European Parliament: The Democratic Dream," The Economist: 22.

propose amendments, veto new members from coming into the Union, block certain agreements and establish committees of inquiry on the Commission and the Council.[276] The EP was described as resembling an "upper house, entitled to scrutinize, question, delay, and sometimes amend."[277]

The results of the Maastricht treaty, after much negotiation,[278] for the EP were as follows: an increase in readings of proposed legislation, an increase in the areas subject to co-decision-making, broadened veto powers, the right to veto the Council's choice for Commission president, and an increase in the number of Members of the European Parliament (MEP's). The actual role of the European Parliament is changing from that of a backwater repository for politicians to that of an effective legislative body endowed with substantive and broadening powers. The representative nature of the Parliament is seen as a threat by the Council of Ministers because the EP is a truly supranational organization that is not accountable to the national governments, but to the voters.

The EP may be expected in the future to exercise its new powers to its fullest, and to test the limits of its delegated powers. At the next Intergovernmental Conference in 1996, the EP will probably further try to extend its powers by: "requesting assent for all constitutional matters," a right to advise and consent on Commission appointments, and authority regarding individual censure of Commission members.[279] The assent on constitutional matters, in

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[276]Andrew Duff, "Building a Parliamentary Europe:" 148-149.
[277]"European Parliament: The Democratic Dream," The Economist: 22.
[278]The best single source on the negotiations of the Maastricht Treaty is Richard Corbett, "The Intergovernmental Conference on Political Union," The Journal of Common Market Studies 30, no. 3, (September 1992): 271-298.
[279]Andrew Duff, "Building a Parliamentary Europe:" 164. The assent on constitutional matters would include modifying the scope of the EU budget (Article 201), increasing the powers of the Treaty (Article 235), and adopting constitutional Amendments (Article 236). The article that Duff mentions in regards to amending procedures (Article 236, which was originally established in the Treaty Establishing the European Economic Community in 1957), have been repealed in the Maastricht Treaty on European Union (the Maastricht Treaty is a set of provisions amending the

order to be consistent with Calhoun's model of concurrent majority, should be prescribed only if a two-thirds absolute majority of the EP is obtained. On normal legislative matters, the assent of the EP might be based on either an absolute majority of all MEP's or a super-majority (three-fifths), not a majority of those present. This would require the MEP's to be more attentive to legislative matters and at the same time give the EP more credibility.

The manner of representation for the EP also correlates with the theory of concurrent majority in that the smaller states have a greater proportion of representation in relation to their size than do the larger states. The current powers that the EP possesses seem to go up to the limits of Calhoun's theory, however. Even though many speak of the EU's "democratic deficit," to make the EP a pure parliamentary democracy on the model of the House of Commons or the Bundestag would put the majority of the votes of the EP in just four of the fifteen members (Germany, France, Britain and Italy). In order then to make a compromise with the proponents of the European Parliament, one could make the EP into a lower house and the Council of Ministers into an upper house, each having a check on the other. The Council could still use qualified majority voting (which requires roughly seventy percent of the votes in order to pass legislation), while the EP could use perhaps a super-majority system (three-fifths) or an absolute majority.

The Council, as stated before, closely resembles the concurrent majority system with regard to the number of votes required to pass legislation.

Treaty Establishing the European Economic Community with a view to Establishing the European Community). This means that any amendment to the Treaty is only through the EU branches and not through the electorate of the member states (via national referenda or special ratifying conventions). While this may make it easier to change the Treaty, it makes the treaty much more susceptible to being changed due to a passing passion of the moment, without the knowledge of the people.

Moreover, on important issues, unanimity is required.[280] A possible change to the Council would be to have the individual member state Minister be a permanent position, and have the minister for the particular topic area (e.g., agriculture, finance, and fisheries) under discussion act as a deputy-advisor to the EU Minister of the nation-state. This would enable each member state to have a minister that would be cognizant of all EU matters, thus having greater situational awareness of how different matters might affect his or her member state. (Such an arrangement is apparently already the case in some member EU countries.) Another improvement would be to allow greater public scrutiny of the proceedings of the Council. If the citizens of the member states had a greater knowledge of the deliberations of the Council, they would be able to play a greater role in the affairs of their particular nation and the EU as a whole. In any future scenario of an integrated Europe, the Council will probably continue to maintain the status of *primus inter pares* in relation to the other EU branches.

The European Commission acts as the executive branch of the EU. It proposes legislation and enforces the Treaty obligations of the member states. Since the advent of the Single European Act (SEA), the Commission has come under increasing scrutiny as a bureaucratic hegemon within the EU. The Maastricht Treaty limited the powers of the Commission in that the EP must approve the appointment of the Commissioners, who are proposed by the Council; also, the Commission is no longer the sole initiator of legislation.[281]

A problem may stem from is the fact that the Commission is made up of representatives from the member states. The more the EU increases in membership, the greater the number of Commissioners it will have. This leads to

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[280]Richard Corbett, "The Intergovernmental Conference on Political Union:" 289-290.
[281]"Cacophony in Brussels," The Economist, (3 September 1994): 49-50.

the proposition that "talented people with too little to do often make mischief."[282] Since the EP cannot dismiss individual Commissioners, the Commission may at some point attempt to overstep its bounds without fear of reprisals from the EP or the Council. To remedy this, the EP might be empowered to remove individual members of the Commission who are acting contrary to the guidelines of the Treaty, provided that they obtain a two-thirds vote in the EP to this effect, and an affirmative from the Council as well.

Some may argue that some of the aforementioned suggestions could produce gridlock and ineffective government, and that to rely on the Council could result in compromise and indecisive Community action. This is, for the most part, true. Yet one should always remember that politics is the art of compromise. To take decisive action on the will of a simple majority of the aggregate might, in the absence of proper safeguards, be unfair to the minority. So, for example, France, Italy, Spain, Greece, Portugal and Belgium (all economic interventionists[283]), with a simple majority in the EP, could dictate to the rest of the Union the social and economic path to take. This could mean central government control of the European Central Bank, something that the Germans are vehemently against.[284] A system of governance that requires all the parties to compromise to reach consensus allows the system to function without hostility of one interest against the other.

2. The European Court of Justice

Special attention should be paid to the ECJ. Just as the United States Supreme Court has taken an increasingly powerful role in the federal

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[282]Ibid.
[283]James B. Steinberg, "An Ever Closer Union:" European Integration and its Implications for the Future of U.S. - European Relations (Santa Monica, CA: RAND R-4177-A, 1993): 18.
[284]Ibid.: 83.

government,[285] so too has the ECJ taken an increasingly influential role in the EU.[286] Some students of the EU surmise that the ECJ is the institution most responsible for progress in the integration process of the EU thus far.[287] The role of the ECJ has come to encompass judicial review and, some would argue, judicial activism as well. While proponents of deeper integration in the EU view the current policies of the ECJ as an asset, others view the ECJ as a political body pursuing its own agenda without being accountable to the electorate.[288]

Several landmark decisions of the ECJ have gone far in allowing the ECJ to not only further the integration process, but to consolidate its own power within the EU. The cases include *Van Gend en Loos v. Nederlandse adminstraite der belastingen* (1963) and *Costa v. ENEL* (1964).[289] Both cases stipulated the

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[285]For example, the Supreme Court has recently ruled, in *U.S. Term Limits, Inc., et al. v. Thornton et al., (No. 93-1456),* that the States did not have the right to set term limits on it's members of the U.S. House of Representatives or the Senate.

[286]For excellent analyses of the ECJ in the process of political integration, see Martin Shapiro and Alec Stone, "The New Constitutional Politics of Europe," Comparative Political Studies 26, no. 4 (January 1994): 397-420; G. Frederico Mancini, "The Making of a Constitution for Europe," in Robert O. Keohane and Stanley Hoffman, eds., The New European Community: Decisionmaking and Institutional Change (Boulder, CO: Westview Press, 1991): 177-194; Anne-Marie Burley and Walter Mattli, "Europe Before the Court: A Political Theory of Political Integration," International Organization 47, no. 1 (Winter 1993): 41-76; J.H.H. Weiler, "A Quiet Revolution: The European Court of Justice and Its Interlocutors," Comparative Political Studies 26, no. 4 (January 1994): 510-534; and J.H.H. Weiler, "Journey to an Unknown Destination: A Retrospective and Prospective of the European Court of Justice in the Arena of Political Integration," Journal of Common Market Studies 31, no. 4 (December 1993): 417-446.

[287]Anne-Marie Burley and Walter Mattli, "Europe Before the Court: A Political Theory of Political Integration," International Organization 47, no. 1 (Winter 1993): 41-76. The authors refer to the ECJ as the "unsung hero" of political integration. The Court, rather than being the arbiter of the contents of the Treaty of Rome and other EU texts, becomes the "policy maker" to prevent any "erosion of the community." The authors also argue that the ECJ follows the neofunctionalist model of integration in that the Court circumvents the nation-state to promote integration while appearing to stay within the bounds of the legal framework of the EU. (p. 57).

[288]Ibid.: 47-48. The authors are referring to Hjalte Rasmussen's On Law and Policy in the European Court of Justice. Rasmussen's thesis is that the ECJ--while pursuing its judicial activism--"was guided by its own rigid policy preferences and repeatedly went 'way beyond the textual stipulations [of the treaty] leaving behind it a variety of well-merited, legal-interpretative principles'."

[289]G. Frederico Mancini, "The Making of a Constitution for Europe," in Robert O. Keohane and Stanley Hoffman, eds., The New European Community: Decisionmaking and Institutional Change (Boulder, CO: Westview Press, 1991): 180, footnotes 8 and 14.

"undisputed existence of a supremacy clause in the Community framework" that was the result of the "judicial creativity" of the Court.[290] The Court has also gained ascendancy over the member-states through Article 177 of the Treaty of Rome:

> The Court of Justice shall have jurisdiction to give preliminary rulings concerning:
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> (a) the interpretation of this Treaty;
>
> (b) the validity and interpretation of acts of the institutions of the Community and of the ECB;[291]
>
> (c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.
>
> Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.
>
> Where any such question is raised in a case pending before a court or tribunal of a Member State, against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.[292]

This Article is seen now as a vehicle for citizens to challenge their national courts where the national law is in conflict with the EU law.[293] Therefore, a citizen or a lower court can invoke Article 177, in which case the ECJ may give its interpretation of the preliminary ruling. The ruling handed back down from the ECJ to the national court is then binding, and the national court has to use that

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[290]Ibid.

[291]The words, "and of the ECB," were inserted into the article in the Maastricht Treaty on European Union in 1991.

[292]Mancini, in "The Making of a Constitution for Europe," in Robert O. Keohane and Stanley Hoffman, eds., The New European Community: Decisionmaking and Institutional Change (Boulder, CO: Westview Press, 1991): 184, interprets Art. 177 of the Treaty of Rome as giving the Court jurisdiction "to rule, on a reference from courts and tribunals of the member states, on any question of interpretation and validity of Community law raised before them; lower courts *may* request the Court of Justice to give a preliminary ruling, whereas courts of last resort *must* send the matter to Luxembourg [the seat of the ECJ]." (Emphasis added.)

[293]Ibid.: 185.

interpretation of the ruling in its own final decision. In essence, the decisions of the ECJ are superior to those of the national courts.[294] Due to this constitutionalization of the EU treaties, the ECJ is now seen as the highest court in the land in every EU member state.[295]

Anne-Marie Burley and Walter Mattli state quite categorically that the ECJ, and the legal profession associated with Community law, are dedicated to seeing the Court used for the purpose of further integration and the advancement of its own political agenda.[296] "By denying the existence of judicial activism and thus removing a major potential locus of opposition to the Court, they (the EU legal community) promote an institution whose pro-community values accord with their own internalized values."[297]

Why have the EU members been acquiescent in letting the ECJ make the judicial rulings without any apparent struggle? J.H.H. Weiler hypothesizes that four reasons explain why the national courts and governments have allowed the ECJ to do what it has done.[298] The first is formalism. The national courts and governments have accepted the ECJ decisions because the apparent hierarchical nature of the ECJ and the language of "legalese" have lent that body a position assumed to be superior to that of the national courts and governments. The ECJ

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[294]J.H.H. Weiler, "A Quiet Revolution: The European Court of Justice and Its Interlocutors," Comparative Political Studies 26, no. 4 (January 1994): 515.

[295]Mancini quotes French Prime Minister Michel Debré: "I accuse the Court of Justice of morbid megalomania." See Mancini, "The Making of a Constitution for Europe:" 177.

[296]Anne-Marie Burley and Walter Mattli, "Europe Before the Court: A Political Theory of Political Integration," International Organization 47, no. 1 (Winter 1993): 69-71. The authors add that the criticism about the ECJ's judicial activism "reveals that the substantive stakes concern the prospects for the Court's self-professed task, integration. In heeding wide-spread advice to maintain a careful balance between applying community law and articulating and defending community ideals, the Court is really preserving its ability to camouflage controversial political decisions in 'technical' legal garb."

[297]Ibid.: 70.

[298]J.H.H. Weiler, "A Quiet Revolution: The European Court of Justice and Its Interlocutors:" 520-528.

has had "senior jurists from all member states" and the language of the rulings has given the ECJ the appearance of an austere and prestigious body that must be obeyed.[299]

A second reason put forth by Weiler is self-interest. For the national courts, it has been advantageous to fall in line with the portions of the legal profession which have "developed a stake--professional, financial, and social--in the successful administration of Community law by and through the national judiciary and [which] have thus acted as an agency for its successful reception."[300] In other words, the national courts wanted to share in the laurels of praise for integration and to gain associated benefits. The self-interest for the national governments lay in the fact that the Court could make the bargains set forth in the Treaty stick with the other members.[301] One could also hypothesize that the national governments would adhere to the Court decisions because the governments could then tell their respective constituents that they had no power over the decisions of the ECJ, thus absolving themselves of responsibility for any potentially unpopular decisions which might endanger them with the voters.[302]

Weiler gives as a third possible reason for the acquiescence of national courts "reciprocity and transnational judicial cross-fertilization."[303] This lengthy term implies that the national courts accept the rulings of the ECJ because the other national courts do likewise, and failure to accept the ECJ rulings might give the national court a lower prestige than the courts that do accept the ECJ's decisions.

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[299]Ibid.: 521.
[300]Ibid.
[301]Ibid.: 527.
[302]This hypothesis could apply to any government with a national court system.
[303]Ibid.: 521.

Weiler's fourth explanation is judicial empowerment.[304] Article 177 gave the lower courts in each member state considerable power against the national courts (because they could appeal beyond the national courts to the ECJ), and the national courts increased power over the national governments (because they could also seek additional authority through ECJ decisions). According to Weiler "the ingenious nature of Article 177 ensured that national courts did not feel that the empowerment of the ECJ was at their expense."[305]

Weiler adds that the national governments have perceived the ECJ as a neutral body, staying within its legal bounds.[306] Another explanation for the national governments' acceptance is transparency.[307] The ECJ's decisions were accepted, in the pre-Single European Act European Community, because the governments held the veto of the "Luxembourg Compromise" to block any EU measure that they felt was inimical to their interests.

As one compares the decisions of the ECJ with those of the United States Supreme Court (as discussed in Chapter III), one can draw parallels between the two with regard to the precedents which consolidate the power of the courts and the central governments. Without a clear set of guidelines within the treaty text, and without any explicit reference to gaining judicial redress by the national courts or governments, the ECJ has gone beyond its original scope. Even Chancellor Kohl, a firm supporter of European integration, has stated that: "If one takes the Court of Justice...it does not only exert its competencies in legal matters, but goes far further. We have an example of something that was not

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[304]Ibid.: 523.
[305]Ibid.
[306]Ibid.: 525.
[307]Ibid.: 528.

wanted in the beginning. This should be discussed so that the necessary measures may be taken later."[308]

One can sense a growing reluctance to place full faith in the ECJ to protect national sovereignty. For example, one could hypothesize that in the future, with a powerful ECJ, and an inability by the member states to protect themselves, the ECJ could rule that the actions or policies of certain national governments are contrary to the spirit of the EU. Since EU law is held superior to national law, that particular national government might find that specific actions or policies are no longer considered legal within the framework of the EU. And since the member states have had a history of acquiescing to decisions by the ECJ, with a string of precedents to uphold the ECJ, it would be difficult indeed for the member state to dissent. This example illustrates how matters that are traditionally left to the member states to decide upon may be in the hands of a court that is beyond the reach of the electorate.

The Maastricht Treaty reflects of a growing distrust of the ECJ in that it excludes the ECJ from two of the three pillars.[309] The 1996 Intergovernmental Conference will also introduce the idea of "restricting lower-level national courts from sending preliminary ruling questions to the Court" in accordance with Article 177.[310] Weiler suggests creating regional Circuit Courts (analogous to the U.S. Federal District Courts), and a transformation of the ECJ into a more

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[308]Kohl cited in ibid.: 533. The citation was taken from Europe, 14.10.92, No. 5835.

[309]Burley and Mattli, "Europe Before the Court:" 73-74. The two pillars mentioned are the foreign and security policy, and justice and home affairs. The pillar that the ECJ does have jurisdiction is the Maastricht Treaty on European Union. One could argue, though, that the Court may decide that since EU law is the supreme law of the land it has precedence over intergovernmental laws or treaties. In other words, it might be argued that, since the ECJ is the ultimate arbiter of EU law, it therefore has proper jurisdiction over any intergovernmental treaty that concerns members of the EU .

[310]Karen J. Alter and Sophie Meunier-Aitsahalia, "Judicial Politics in the European Community: European Integration and the Pathbreaking *Cassis de Dijon* Decision," Comparative Political Studies, 26, no. 4 (January 1994): 558.

narrowly defined Constitutional Court.[311] It will be important to establish a clearly defined set of constitutional parameters for the ECJ to operate in, and to allow the member states, as well as the other EU institutions, to have some mode of redress or protection from any encroachment by the ECJ.

A supreme court is an integral part of any constitutional government. It is the bulwark of the constitution and the protector of the citizens' rights from any encroachment by the government. But, as with any organization, there may be times when it will be run by people wishing to aggrandize its power at the expense of other institutions. The court may also at times choose to operate as a "third chamber," providing policies for the rest of the government to follow without any choice, for Western governments have had many centuries of tradition in following the rule of law. What Calhoun argued throughout his career was that power should not be concentrated; it should not come to rest at a single point. Rather, the checks on power should be well-distributed: the states having a check on the central government, the central government having a check on the states, the electorate having a check on both, and the constitution having a check on the electorate.

3. The Member States

As stated before, in any sort of compact or union, the separation of powers should not only be within the central government, but between the central government and the member states. The member states need to retain some mode of self-defense against encroachment by the central government.[312] If the EU Treaty does not explicitly contain provisions for the member states, and the people of the states, to retain control over their sovereignty, the creeping

[311]J.H.H. Weiler, "Journey to an Unknown Destination:" 442.
[312]One could argue that the United Nations Charter sanctions this in Article 51, acknowledging the "inherent right of self-defense."

jurisdiction of the central government that has been observed in past political unions may ultimately prevail. For example, Article 236 of the Rome Treaty was repealed in the Maastricht Treaty. Article 236 stated:

> The Government of any Member State or the Commission may submit to the Council proposals for the Amendment of this Treaty.
>
> If the Council, after consulting the European Parliament and, where appropriate, the Commission, delivers an opinion in favour of calling a conference of representatives of the Governments of the Member States, the conference shall be convened by the President of the Council for the purpose of determining by common accord the amendments to be made to this Treaty.
>
> The amendments shall enter into force after being ratified by all the Member States in accordance with their respective constitutional requirements.[313]

With Article 236 repealed, there is no clearly defined procedure for the amending process. The central government could therefore conceivably amend the Treaty without the concurrence of the member states.

If the European Union wished to establish a comprehensive concurrent majority system, the principle of nullification and amendment would be explicitly written into the constitution. This would enable the member states to retain their sovereignty, yet not allow any single member to bring to a halt all action in the central government. In the current Maastricht Treaty, Article 3b states:

> In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member states and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.[314]

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[313]The Maastricht Treaty on European Union simply states that Article 236 "shall be repealed."
[314]Karlheinz Neunreither, "Subsidiarity as a Guiding Principle for European Community Activities," Government and Opposition 28, no. 2 (Spring 1993): 206-220. See also George A Bermann, "Taking Subsidiarity Seriously:" 331-456.

The exclusive competencies are not specifically delineated in the Treaty. The reason, some believe, is to allow the EU Commission and European Parliament (and the ECJ) to retain flexibility in determining which areas of competence belong to the EU and the member states respectively.[315] If, then, the EU has to determine which areas fall under its competency, Calhoun's theory suggests, the EU will always tend to favor decisions that will grant it more powers. Calhoun's theory also indicates that the constitution should have a clear set of delegated powers that the EU can operate with. Inside the proper boundaries, the EU has, by the lawful consent of the member states, proper jurisdiction within which to operate to its fullest capacity.

But, should any attempt by the EU to go outside its delegated powers occur, Calhoun's theory implies, the EU should not be allowed to be the ultimate arbitrator. For example, if a nation thought a law passed by the EU injurious to the well being of its citizens,[316] and the law was in conflict with the constitution of the EU, the offended nation would bring its grievance to the European Court of Justice. If the ECJ failed to give it satisfaction, Calhoun's theory indicates, the nation could then hold a national referendum or a national convention to determine if the offensive law is indeed unconstitutional and injurious to the nation. If the nation so determined, the national government would then nullify the offending law.

Yet, if the other nations within the European Union determined that the law (that was offensive to the nullifying nation) was, in fact, constitutional and valid, then, with a qualified majority in the Council of Ministers, and a super

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[315]Ibid.: 209.

[316]For example, one could hypothesize that the EU might pass a law via qualified majority voting in the Council that all members must buy goods manufactured in the EU prior to goods manufactured outside the EU. Such a law might well encounter objections from industries and other economic interests in specific EU countries.

majority (two-thirds of all MEP's) in the European Parliament, an amendment could be proposed to make the law a part of the constitution, with the concomitant amendment process started to determine if the law should, in fact, be part of the constitution. If the constitution was so amended, with the concurrence of three-fourths of the European Union member states, the nullifying nation would then have a responsibility to obey the constitution. For, as Calhoun stresses throughout his writings, the law of the constitution should always have ascendancy over the legislative law. It should be recalled that the member state has ratified the constitution, thus promising to obey all parts of the constitution. If the offensive law has become part of the constitution that the state has promised to honor, then it follows that the state has the duty to honor its commitment.

C. CONCLUDING REMARKS

It remains to be seen if the EU, in the 1996 review conference, will be able to successfully create a constitution, or as Calhoun refers to it, a "compact." There is a growing sense of ambivalence towards the EU in some of the member states.[317] Britain is committed to the intergovernmentalist approach.[318] France's increasingly Gaullist tendencies make it more nationalistic than prior to the debate over ratification of the Maastricht Treaty.[319] Even in Germany, one of the

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[317]James B. Steinberg, "An Ever Closer Union": 139-141.

[318]"Memorandum on the United Kingdom Government's Approach to the Treatment of European Defence Issues at the 1996 Inter-Governmental Conference." The memorandum states in paragraphs 20 and 21 that the "nation state should be the basic building block in constructing the kind of international order we wish to see;" and that the "differing rights and responsibilities of nations should be respected." It would seem that even with a change of government, the opposition to "an ever closer union" would be just as strong.

[319]"France's Wandering Eye," The Economist (26 November 1994): 55-56. The article states: "And virtually nobody liked the crack about countries such as France that still cling to the notion 'that it is impossible to give up the sovereignty of the nation state, although this sovereignty has long since become an empty shell.' French sensitivity arises because the question of sovereignty goes to the heart of the dilemma over Europe." The "crack" referred to may be found in the fall 1994 CDU document on the future of the EU. See also Jean-Baptiste Duroselle, "General De

most staunch supporters of the EU, "attachment to the European institutions [has] diminished."[320] People in some of the smaller EU countries--Denmark, for instance--have also expressed apprehension regarding a centralized EU.[321]

Political experience suggests that the EU institutions--above all, the ECJ, the European Parliament and the Commission--will always try to centralize their power, and that the member states will always try to retain as much power as they can. If the status quo is kept, the EU will remain relatively ineffectual in the most difficult areas of operation (e.g., certain aspects of security and foreign policy) and may thus continue to lose legitimacy in the eyes of the citizens of the member states. If the EU took the route of strict federalism (or, for that matter, the functionalist or neofunctionalist route), the prospects for centralization would be enhanced, thus eroding the sovereignty of the member states. But, if the path of concurrent majority was followed in some form, the EU would have a government that could operate cohesively and effectively in its delegated powers. The member states would then be able to pursue their interests with their reserved powers, assured that their identities as sovereign nations were not in jeopardy.

Gaulle's Europe and Jean Monnet's Europe," in Carol Ann Cosgrove and Kenneth J. Twitchett, eds., The New International Actors: The UN and the EEC (London: Macmillan, 1970): 187-200, for a detailed view of de Gaulle's thoughts on an integrated Europe.

[320]Jacob Heilbrunn, "Tomorrow's Germany," The National Interest (Summer 1994): 44-52. Heilbrunn adds: "the Bundesbank has made it abundantly clear that it will not sacrifice the deutschmark on the altar of European unity," and that the "Christian Democrats (CDU) [have] begun to show some distinct unease about European unity..." (p. 45).

[321]The centralizing tendencies of the political union were apparently one of the reasons why the majority of voters in Norway did not want to join the EU. For example, most Norwegians did not want their territorial waters to become EU common property, subject to EU law rather than Norwegian law.

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